

95 A.D.2d 759, *; 464 N.Y.S.2d 516, **; Monday, 03 May, 2010 08:48:23 PM
 1983 N.Y. App. Div. LEXIS 18665, ***; CCH Prod. Liab. Rep. P9820 Clerk, U.S. District Court, ILCD

LEXSEE

Beverly Landrine, Individually and as Administratrix of the Estate of Keri Landrine, Deceased, Respondent, v. Mego Corporation et al., Respondents, and Perfect Products Co., Appellant. Mego Corporation et al., Third-Party Plaintiffs, v. Bel Arbor Novelty et al., Third-Party Defendants

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Appellate Division, First Department

95 A.D.2d 759; 464 N.Y.S.2d 516; 1983 N.Y. App. Div. LEXIS 18665; CCH Prod. Liab. Rep. P9820

June 30, 1983

JUDGES: [***1] Concur -- Kupferman, J. P., Sandler, Sullivan, Fein and Alexander, JJ.

OPINION

[*759] [**517] Order, Supreme Court, New York County (White, J.), entered March 11, 1983, which denied defendant Perfect Products Co.'s motion for summary judgment dismissing the complaint and the cross claims against it, unanimously reversed, on the law, without costs or disbursements, and the motion granted. Plaintiff's intestate, her infant daughter, died after playing with a doll known as "Bubble Yum Baby", when she somehow swallowed a balloon used to inflate the doll. The attraction of the Bubble Yum doll was that it could simulate the blowing of a bubble gum bubble. A balloon was inserted in the doll's mouth with the use of a mouthpiece, and then inflated by pumping the doll's arm. The balloon was manufactured by defendant Perfect. Plaintiff has brought this action for personal injuries and wrongful death against Perfect, Mego Corporation, the manufacturer and distributor of the doll, and Life Savers, Inc., the owner of the Bubble Yum trade-mark. Mego apparently bought the balloons from two wholesale novelty distributors, who had purchased the balloons from Perfect. The distributors [***2] have been impleaded. Perfect denies that it had any knowledge of the resale of the balloons by its distributors to Mego, or that Mego, or anyone else, intended to use the balloons in the doll. The causes of action against all the defendants, including Perfect, are grounded in negligence, breach of express warranty and implied warranty, and strict tort liability. The essence of all of these claims is that the balloons were defectively made or are inherently unsafe when used by children, and that the defendants failed to warn plaintiff of the damages associated with balloon usage. Perfect moved for summary judgment on two grounds, viz., that it was not

liable as a [**518] matter of law, and that the court lacked jurisdiction over it. Without conceding the point should the matter go to trial, for purposes of the motion Perfect assumed that its balloon was used in the doll with which the deceased was playing. Special Term denied the motion. We find summary judgment should have been granted to Perfect on the first ground and thus reverse. A cause of action in strict products liability arises when a manufacturer places on the market a product which has a defect that causes injury. [***3] ([Codling v Paglia](#), 32 NY2d 330, 342.) "[A] defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce". ([Robinson v Reed-Prentice Div. of Package Mach. Co.](#), 49 NY2d 471, 479, citing [Restatement, Torts 2d, § 402A](#).) On this record neither plaintiff nor the cross claimants have established that the balloons were unreasonably dangerous or defectively made. Absent a finding that all balloons are inherently dangerous, and that consequently a warning of the possible dangers must be given, Perfect cannot be held liable. Balloons in and of themselves are not dangerous. Their characteristics, features and propensities are well known, to children and adults alike. No duty to warn exists where the intended or foreseeable use of the product is not hazardous. Furthermore, "there is no necessity to warn a customer already aware -- through common knowledge or learning -- of a specific hazard." ([Lancaster Silo & Block Co.](#) [***4] [v Northern Propane Gas Co.](#), 75 AD2d 55, 65.) Digestion of a balloon is not an intended use, and to the extent it is a foreseeable one, it is a misuse of the product for which the guardian of children must be wary. Were it otherwise, anything capable of being swallowed would have to be kept from a child. Even if a warning were

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required in this case, it would have had to be [*760] directed to the guardian since the "legal responsibility, if any, for injury caused by [a product] which has possible dangers incident to its use should be shouldered by the one in the best position to have eliminated those dangers." (Micallef v Miehle Co., Div. of Miehle-Goss Dexter, 39 NY2d 376, 387.) We see no need for such a warning. The ingestion of a balloon -- which is not its intended use -- is an act fraught with peril. Like a caution to drive carefully when operating heavy equipment (see Torrogrossa v Towmotor Co., 44 NY2d 709), a self-evident warning is unnecessary. Moreover, since the record is barren of any evidence that Perfect knew or had any reason to know that its balloons would be inserted in "Bubble Yum" dolls, any injury resulting

from the use of the doll cannot be [***5] charged to it. The duty of a manufacturer merely "extends to the design and manufacture of a finished product which is safe at the time of sale." (Robinson v Reed-Prentice Div. of Package Mach. Co., 49 NY2d 471, 481, *supra*.) Any unforeseen modification of the product after it leaves the manufacturer's hands is not its responsibility. To broaden the scope of its liability would be to demand of a manufacturer that it insure against all injuries which may arise from the use or misuse of its product. The law does not impose such a duty. (See Biss v Tenneco, Inc., 64 AD2d 204, 207-208.) Since, as a matter of law, Perfect cannot be found liable we need not reach the question of whether it is subject to the jurisdiction of this court. The complaint and cross claims against it are dismissed.

LEXSEE

[*1] **ERIC LANTZY et al., Appellants, v ADVANTAGE BUILDERS, INC., Respondent.**

505491

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

2009 NY Slip Op 2278; 60 A.D.3d 1254; 876 N.Y.S.2d 184; 2009 N.Y. App. Div. LEXIS 2221

**March 26, 2009, Decided
March 26, 2009, Entered**

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

COUNSEL: Freeman Howard, P.C., Hudson (Cailin C. Brennan of counsel), for appellants.

Cooper, Erving & Savage, L.L.P., Albany (David C. Rowley of counsel), for respondent.

JUDGES: Before: Mercure, J.P., Lahtinen, Malone Jr. and Kavanagh, JJ. Lahtinen, Malone Jr. and Kavanagh, JJ., concur.

OPINION BY: Mercure

OPINION

[**1254] [***185] MEMORANDUM AND ORDER

Mercure, J.P.

Appeal from an amended order of the Supreme Court (Donohue, J.), entered July 8, 2008 in Columbia County, which granted defendant's motion for summary judgment dismissing the complaint.

Plaintiffs entered into a contract with defendant for the purchase of real property in the Town of Kinderhook, Columbia County, and for construction of a one-family home. Title to the home was transferred in September 2002, and a certificate of occupancy was issued by the Town in January 2003. Thereafter, in 2005, plaintiffs

experienced flooding in their basement. After a recurrence in early 2006, plaintiffs presented defendant with written notice of a warranty claim. Defendant surveyed the situation with the assistance of an engineer, who noted historically high amounts of rain and suggested steps to remediate the problem. Dissatisfied with defendant's response, plaintiffs commenced this action. Supreme Court subsequently granted defendant's motion for summary judgment and dismissed the complaint. Plaintiffs now appeal, and we affirm.

Plaintiffs first contend that Supreme Court erred in granting defendant's motion for summary judgment because a material issue of fact exists regarding whether the alleged defects to the home fell within the six-year warranty provided by the parties' contract. As a condition precedent to commencing an action under the limited warranty, plaintiffs were required to give defendant timely written notice of a claim after the expiration of [**1255] the applicable warranty period [*2] (*see General Business Law § 777-a [4] [a]; Rushford v Facticeau*, 247 AD2d 785, 785-786, 669 N.Y.S.2d 681 [1998]). Here, while the contract failed to specify the date from which the warranty period was intended to run, the parties agree that the latest it could have started to run was January 27, 2003, when the certificate of occupancy was issued. Moreover, although the contract included one-year warranty coverage for defective workmanship, materials or design and two-year coverage for major mechanical systems, plaintiffs admittedly did not submit a written notice of warranty claim until January 2006. Thus, as plaintiffs concede, any claims against defendant in this regard must fall within the six-year warranty, which covered only "major structural defects," i.e., material defects resulting in "actual physical damage" to load-bearing portions of the home

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and that render the home "unsafe, unsanitary or otherwise unlivable."

As Supreme Court noted, however, plaintiffs allege no damage to the load-bearing portions of the home and, in fact, they admitted that the flooding in the basement had caused only minor property damage and no physical damage to the house at all. Furthermore, plaintiffs conceded that testing of mold, which they claim resulted from the flooding, did not show anything dangerous. Indeed, plaintiffs have resided in the home with their children continuously since January 2003 and have continued to use the basement for work, play and exercise. As such, we find that plaintiffs' claim was not covered by the six-year warranty provision in the limited warranty and, therefore, plaintiffs' notice of claim was not timely and Supreme [***186] Court correctly dismissed plaintiffs' claim under the limited warranty (see *Finnegan v Brooke Hill, LLC*, 38 AD3d 491, 491-492, 833 N.Y.S.2d 107 [2007]; *Pinkus v V.F. Bldrs.*, 270 AD2d 470, 470, 705 NYS2d 283 [2000], *lv denied* 95 NY2d 758, 734 N.E.2d 1213, 713 N.Y.S.2d 2 [2000]; *Rushford v Facticeau*, 247 AD2d at 785-786).

Turning to plaintiffs' breach of contract claims, we note that where a limited warranty expressly excludes any common-law implied warranty, it is exclusive and a cause of action sounding in common-law breach of contract may not be maintained (see *Fumarelli v Marsam Dev.*, 92 NY2d 298, 301-302, 703 N.E.2d 251, 680

N.Y.S.2d 440 [1998]; Tiffany at Westbury Condominium v Marelli Dev. Corp., 40 AD3d 1073, 1075, 840 N.Y.S.2d 74 [2007]; *Bedrosian v Guzy*, 32 AD3d 1194, 1195, 822 N.Y.S.2d 181 [2006]; *Pinkus v V.F. Bldrs.*, 270 AD2d at 470). Here, the limited warranty provided by defendant stated that it excluded all other warranties, both express and implied. Therefore, plaintiffs' breach of contract claim, which mirrored claims made under the warranty provisions, was also properly dismissed.

Finally, we conclude that plaintiffs' negligence cause of action [**1256] is premised solely on defendant's failure to perform the obligations of the contract. Inasmuch as no independent legal duty is alleged to have been violated, that claim also fails (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987]; *Venditti v Liberty Mut. Ins. Co.*, 6 AD3d 961, 962-963, 774 N.Y.S.2d 849 [2004]; *Fourth Branch Assoc. Mechanicville v Niagara Mohawk Power Corp.*, 235 AD2d 962, 963, 653 N.Y.S.2d 412 [1997]).

Plaintiffs' remaining assertions, to the extent not addressed herein, have been considered and found to be lacking in merit.

Lahtinen, Malone Jr. and Kavanagh, JJ., concur.

ORDERED that the amended order is affirmed, with costs.

LEXSEE

**MICHAEL MALONE and BARBARA MALONE, husband and wife, Plaintiffs, -
against - BAYERISCHE HYPO-UND VEREINS BANK, AG-NEW YORK
BRANCH; BAYERISCHE HYPO-UND VEREINSBANK US FINANCE, f/k/a
BAYERISCHE HYPO-UND VEREINSBANK STRUCTURED FINANCE, INC.;
KATTEN MUCHIN ROSENMAN, LLP, f/k/a ROSENMAN & COLIN, LLP; and
DOES 1 through 50, Defendants. MICHAEL MALONE and BARBARA MALONE,
husband and wife, Plaintiffs, - against - ENTERPRISE FINANCIAL SERVICES
CORPORATION, f/k/a ENTERPRISE BANK, A Missouri Corporation, Defendant.**

08 Civ. 7277 (PGG), 09 Civ. 3676 (PGG)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK**

2010 U.S. Dist. LEXIS 9529

**February 4, 2010, Decided
February 4, 2010, Filed**

PRIOR HISTORY: [Malone v. Clark Nuber, P.S., 2009
U.S. Dist. LEXIS 34531 \(W.D. Wash., Apr. 16, 2009\)](#)

COUNSEL: [*1] For Barbara Malone, wife, Michael Malone, husband, Plaintiffs: Brian G. Isaacson, LEAD ATTORNEY, PRO HAC VICE, Isaacson & Wilson, P.S., Seattle, WA.

For Enterprise Financial Services Corporation, a Missouri Corporation formerly known as Enterprise Bank, Defendant: Kenneth John Kelly, LEAD ATTORNEY, Lori A Jordan, Epstein, Becker & Green, P.C. (New York), New York, NY.

JUDGES: Paul G. Gardephe, United States District Judge.

OPINION BY: Paul G. Gardephe

OPINION

OPINION AND ORDER

PAUL G. GARDEPHE, U.S.D.J.:

The two above-captioned cases arise from Plaintiffs Michael and Barbara Malone's investment in the Coastal Trading Common Trust Fund Series III and IV, a tax shelter that the Internal Revenue Service subsequently disallowed.

The Malones filed suit against Defendants Bayerische Hypo-Und Vereins Bank, AG-New York Branch; Bayerische Hypo-Und Vereins Bank US Finance f/k/a Bayerische Hypo-Case Und Vereins Bank Structured Finance, Inc. (collectively, "HVB") and Defendant Katten, Muchin Rosenman, LLP, f/k/a/ Rosenman & Colin, LLP ("Katten") on August 15, 2008, and filed an amended complaint on September 30, 2008 (the "HVB-Katten Complaint"). HVB has moved to dismiss under [Fed. R. Civ. P. 8\(a\)](#) and [9\(b\)](#), and both HVB and Katten [*2] have moved to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#). The Malones have filed a cross-motion for leave to file a second amended complaint pursuant to [Fed. R. Civ. P. 15\(a\)](#).

1 This matter was originally assigned to Judge Peter K. Leisure and was reassigned to this Court on October 14, 2009.

The Malones' complaint against Defendant Enterprise Financial Services Corporation, f/k/a Enterprise Bank ("Enterprise") was filed on April 10, 2009 (the "Enterprise Complaint"). Enterprise has moved to dismiss pursuant to [Fed. R. Civ. P. 12\(b\)\(2\)](#) and [12\(b\)\(6\)](#).

For the reasons set forth below, the motions to dismiss filed by Defendants HVB, Katten and Enterprise will be GRANTED, and Plaintiffs' motion for leave to file a second amended complaint will be DENIED.

BACKGROUND

In 2001, Plaintiff Michael Malone received income and capital gains from the sale of his company and subsequently sought "investment and tax planning advice" from his accounting firm, Clark Nuber. (HVB-Katten Compl. PP 14-1S) Based on Clark Nuber's advice, Malone invested \$ 1,700,000 in the Coastal Trading Common Trust Fund Series III and IV ("CTF"). (Enterprise Compl. P 53; HVB-Katten Compl. P 106)

CTF was a tax shelter vehicle in which [*3] investors pursued a strategy of purchasing foreign currency options in "economically offsetting gain and loss positions." See [IRS Notice 2003-54 \(Aug. 18, 2003\)](#). Plaintiffs allege that HVB agreed to provide a \$ 15.6 million loan to non-party Braxton Management, Inc. which, in turn, would loan the funds to Malone, who would invest the funds in "a corporation wholly owned" by him. ² (HVB-Katten Compl. PP106, 107 and Ex. D) These funds were used to finance the purchase of foreign currency options that generated both losses and gains; the losses were allocated to investors such as Plaintiffs and the gains were allocated to tax-indifferent trusts. ³

2 Malone invested the funds in two entities controlled by him: Belmar Investment Trust and Belmar Trading, Inc. See HVB-Katten Compl. P X; Enterprise Compl. P 10.

3 The scheme is described in more detail in [Malone v. Clark Nuber, P.S., No. C07-2046 \(RSL\), 2008 U.S. Dist. LEXIS 48461, 2008 WL 2545069, at *2 \(W.D. Wash. June 23, 2008\)](#) and [Williams v. Sidley Austin Brown & Wood, L.L.P., 11 Misc. 3d 1064A, 816 N.Y.S.2d 702, 2006 NY Slip Op 50381U, 2-4 \(N.Y. Sup. Ct. 2006\)](#).

Plaintiffs claim that Defendants, "along with others, designed, promoted, and implemented an illegal, fraudulent, and abusive investment scheme" [*4] in the form of the CTF transaction. (Id. P1; Enterprise Compl. P2) HVB is alleged to have pledged the original loan that would ultimately be transferred to Malone and, in turn, to have collected fees for originating that loan. See, e.g., HVB-Katten Compl. P 49. Malone claims that the HVB "loan was a sham." (Id. PP17, 106, 107) Katten is alleged to have "played a significant role in the design of CTF" and to have produced an opinion letter regarding the propriety of the CTF transaction. (Id. PP51-53, 62; see also HVB-Katten Proposed Second Amended Complaint ("SAC") Ex. J) Katten's opinion letter was also referenced in an opinion letter provided to Malone by Sidley Austin Brown & Wood on March 8, 2002. (HVB-Katten Compl. PP54-56, Ex. C) Enterprise is alleged to have served as "the trustee of both the Coastal Trading Common Trust Fund and [as] the Trustee of an

irrevocable trust organized by Enterprise for the benefit of Malone." (Enterprise Compl. P 37)

On August 18, 2003, the Internal Revenue Service issued [Notice 2003-54](#), entitled "Common Trust Fund Straddle Tax Shelter." [IRS Notice 2003-54 \(Aug. 18, 2003\)](#); see also HVB-Katten Compl. P 34. The IRS Notice stated that CTF was "being used [*5] by taxpayers for the purpose of generating deductions" and announced that "the claimed tax benefits purportedly generated by these transactions are not allowable for federal income tax purposes." [IRS Notice 2003-54 \(Aug. 18, 2003\)](#). The IRS identified the lack of economic substance as CTF's fatal flaw:

[t]he offsetting positions entered into by the CTF did not have any effect on the CTF's net economic position or non-tax objectives and did not serve any non-tax objectives of the CTF or afford it a reasonable prospect for profit. Therefore, the losses purportedly resulting from this transaction are not allowable.

[IRS Notice 2003-54 \(Aug. 18, 2003\)](#).

On December 22, 2003, Michael Schwartz, the President of Coastal Trading Fund LLC, sent a letter to Michael Malone notifying him of the IRS Notice regarding Common Trust Fund transactions and "stating that the IRS intended to challenge the tax benefits associated with such transactions." (Poretz Decl. Ex. B) Schwartz told Malone that the IRS Notice "has led me to conclude that the IRS will shortly begin an investigation of my company as well, ultimately requiring me to provide them with a list of all clients that have entered into listed transactions. [*6] Id. As such it is almost certain that you will [be] audited at some time in 2004." Id. Schwartz's letter further stated that Malone should file an amended return, because "[t]he IRS recently has been taking the very aggressive position that tax opinions do not necessarily provide penalty protection on the basis that the taxpayer did not reasonably rely in good faith on the opinion. . . . While the imposition of penalties mayor may not be ultimately sustained, the IRS is likely to aggressively fight the removal of these penalties. For this reason, we recommend the need to file an amended return." Id.

On April 25, 2005, the IRS issued a summons to Enterprise relating to the Malones' investment in CTF. (HVB-Katten Compl. P180; Enterprise Compl. P71) On June 20, 2005, the IRS issued a summons to HVB relating to any loans or extensions of credit made between January 1, 2001 and December 31, 2004, the proceeds of which were extended to the Malones, Belmar

Trust or Belmar Trading. (HVB-Katten Compl. P181; Enterprise Compl. P72) As a result of an IRS audit, Malone claims to have paid a deficiency of \$ 3,649,066.00, a penalty of \$ 364,907.00 and additional interest in the amount of \$ 388,785.00. [*7] (HVB-Katten Compl. P182; Enterprise Compl. P73)

In August 2005, Domenick DeGiorgio, co-head of HVB's Financial Engineering Group, pleaded guilty to criminal charges arising out of his involvement in HVB's use and promotion of tax shelters. (HVB-Katten Compl. Ex. B) In February 2006, HVB entered into a deferred prosecution agreement with the Government relating to its participation in fraudulent tax shelters. (Id.) On May 23, 2007, the IRS announced that it had reached a settlement with Sidley Austin concerning "the firm's promotion of abusive tax shelters and . . . failure to comply with tax shelter registration requirements." "Sidley Austin LLP Pays IRS \$ 39.4 Million Penalty," IR-2007-103 (May 23, 2007).

On September 7, 2007, the Malones filed a lawsuit in Washington state court against several firms involved in the CTF transaction, including the HVB entities named in the instant action and Enterprise. See Pltf. Enterprise Br. 19; [Malone v. Clark Nuber, P.S., No. C07-2046 \(RSL\), 2008 U.S. Dist. LEXIS 48461, 2008 WL 2545069 \(W.D. Wash. June 23, 2008\)](#). The case was subsequently removed to federal court and was assigned to Judge Robert Lasnik in the Western District of Washington. [Malone, 2008 U.S. Dist. LEXIS 48461, 2008 WL 2545069, at *3](#).

On [*8] June 23, 2008, Judge Lasnik dismissed the claims against the HVB entities for improper venue, and also dismissed a number of claims against Enterprise, including the federal claims that had provided the basis for the court's exercise of personal jurisdiction over Enterprise. [2008 U.S. Dist. LEXIS 48461 at * 3, 5-14; Malone v. Clark Nuber, P.S., No. C07-2046 \(RSL\), 2009 U.S. Dist. LEXIS 13874, 2009 WL 481285, at *1 \(W.D. Wash. Feb. 23, 2009\)](#). The court then gave the Malones an opportunity to "establish an independent basis for asserting personal jurisdiction over the Enterprise defendants" in an amended complaint. [Malone v. Clark Nuber, P.S., No. C07-2046 \(RSL\), 2008 U.S. Dist. LEXIS 70688, 2008 WL 4279502, at *2 \(W.D. Wash. Sept. 12, 2008\)](#). On February 23, 2009, after the Malones had filed a second and third amended complaint, Judge Lasnik dismissed the claims against Enterprise for lack of personal jurisdiction. [Malone, 2009 U.S. Dist. LEXIS 13874, 2009 WL 481285](#).

Plaintiffs filed suit against HVB and Katten in the Southern District of New York on August 15, 2008, and asserted three claims for relief under New York law against both HVB and Katten: fraud and aiding and

abetting fraud (Count 1) (HVB-Katten Compl. PP187-209); breach of fiduciary duty and aiding and abetting breach of fiduciary [*9] duty (Count 2) (Id. PP210-21); and conspiracy (Count 4) (Id. PP234-45). The Malones also asserted a breach of contract claim against HVB. (Count 3) (Id. PP222-33)

In their proposed second amended complaint, the Malones assert six causes of action against both HVB and Katten: fraud and conspiracy to commit fraud (Proposed Counts 1 and 7) (HVB-Katten Proposed SAC PP184-203; 244-300); aiding and abetting fraud (Proposed Counts 2 and 8) (Id. PP204-08; 301-06); fraudulent concealment (Proposed Counts 3 and 9) (Id. PP209-18; 307-11); breach of contract (Proposed Counts 4 and 12) (Id. PP219-236; 331-37); breach of the duty of good faith and fair dealing (Proposed Counts 5 and 13) (Id. PP237-39; 338-41); and aiding and abetting a breach of fiduciary duty (Proposed Counts 6 and 11) (Id. P240-43; 328-30). The Malones also allege a breach of fiduciary duty claim against Katten. (Proposed Count 10) (Id. PP312-27)

Plaintiffs' complaint against Enterprise was filed April 10, 2009, and asserts seven claims for relief under New York law including fraud and conspiracy to commit fraud (Count 1) (Enterprise Compl. PP 75-98); aiding and abetting fraud (Count 2) (Id. PP 99-102); fraudulent concealment (Count [*10] 3) (Id. PP 103-12); breach of contract (Count 4) (Id. PP 113-31); breach of fiduciary duty (Count 5) (Id. PP 132-54); aiding and abetting a breach of fiduciary duty (Count 6) (Id. PP 155-61); and breach of the duty of good faith and fair dealing (Count 7) (Id. PP 162-65).

DISCUSSION

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 \(2009\)](#) (quoting [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#)). "In considering a motion to dismiss . . . the court is to accept as true all facts alleged in the complaint," [Kassner v. 2nd Ave. Delicatessen Inc., 496 F.3d 229, 237 \(2d Cir. 2007\)](#) (citing [Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 87 \(2d Cir. 2002\)](#)), and must "draw all reasonable inferences in favor of the plaintiff." Id. (citing [Fernandez v. Chertoff, 471 F.3d 45, 51 \(2d Cir. 2006\)](#)).

"When determining the sufficiency of plaintiffs' claim for [Rule 12\(b\)\(6\)](#) purposes, consideration is limited to the factual allegations in plaintiffs' . . . complaint, . . . to documents attached to the complaint as an exhibit [*11] or incorporated in it by reference, to

matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." [Brass v. Am. Film Techs., Inc.](#), 987 F.2d 142, 150 (2d Cir. 1993).

Defendants have moved to dismiss on several grounds. All defendants argue that Plaintiffs' claims are time-barred. In addition, HVB and Katten contend that the Malones have failed to state a claim as to any of their causes of action, and Enterprise contends that the action filed against it must be dismissed for lack of personal jurisdiction. This Court concludes that all of Plaintiffs' claims -- including the claims that the Malones set forth in their proposed second amended complaint against HVB and Katten -- are time-barred, and that accordingly both of the instant actions must be dismissed. Because Plaintiffs' claims are time-barred, the Court does not reach Defendants' arguments regarding sufficiency of the pleadings and personal jurisdiction.

I. PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

Plaintiffs' claims arise from conduct that took place more than eight years ago, outside the applicable statutes [*12] of limitations. Moreover, none of the tolling provisions cited by Plaintiffs are applicable to their claims. Accordingly, Plaintiffs' claims must be dismissed as time-barred.

A. The Applicable Statutes of Limitations

Under New York law, the statute of limitations for "an action based upon fraud" is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . could with reasonable diligence have discovered it." [CPLR § 213\(8\)](#) (2009); see also [Guilbert v. Gardner](#), 480 F.3d 140, 147 (2d Cir. 2007). This statute of limitations governs the Malones' claims for fraud, conspiracy to commit fraud, aiding and abetting fraud and fraudulent concealment. See [Kottler v. Deutsche Bank AG](#), 607 F. Supp. 2d 447, 459 (S.D.N.Y. 2009) (applying [C.P.L.R. § 213](#) to claims for fraud and aiding and abetting fraud); [Meridien Int'l Bank v. Liberia](#), 23 F. Supp. 2d 439, 449-50 (S.D.N.Y. 1998) (applying the fraud statute of limitations to a "civil conspiracy claim sound[ing] in fraud."); [Riis v. Manufacturers Hanover Trust Co.](#), 632 F. Supp. 1098, 1102-06 (S.D.N.Y. 1986) (applying fraud statute of limitations to fraudulent concealment claim).

The statute of limitations [*13] for breach of contract claims is six years. [CPLR § 213\(2\)](#) (2009). "The claim for breach of the covenant of good faith and fair dealing is grounded in contract and likewise has a limitations period of six [] years." [Resnick v. Resnick](#), 722 F. Supp. 27, 38 (S.D.N.Y. 1989).

The statute of limitations for breach of fiduciary duty and for aiding and abetting breach of fiduciary duty "depends on the substantive remedy which the plaintiff seeks." [Ciccone v. Hersh](#), 530 F. Supp. 2d 574, 579 (S.D.N.Y. 2008) (quoting [Independent Order of Foresters v. Donald, Lufkin & Jenrette, Inc.](#), 157 F.3d 933, 942 (2d Cir. 1998)). "Where a plaintiff alleging breach of fiduciary duty 'seeks only money damages, courts have viewed such actions as alleging injury to property, to which a three-year statute of limitations applies.'" [Ciccone](#), 530 F. Supp. 2d at 579 (quoting [Kaufman v. Cohen](#), 307 A.D.2d 113, 118, 760 N.Y.S.2d 157 (1st Dep't 2003)). Where the alleged "breach of fiduciary duty involves allegations of actual fraud, [however,] the statute of limitations is six years regardless of the remedy sought." [Scantek Med., Inc. v. Sabella](#), 583 F. Supp. 2d 477, 491 (S.D.N.Y. 2008); [Pro Bono Invs., Inc. v. Gerry](#), No. 03 Civ. 4347 (JGK), 2005 U.S. Dist. LEXIS 22348, 2005 WL 2429787, at * 14 (S.D.N.Y. Sept. 30, 2005); [*14] [Kaufman](#), 307 A.D.2d at 119.

Here, Plaintiffs' claims for breach of fiduciary duty depend on the allegedly fraudulent nature of the CTF transaction and the alleged misrepresentations made to them by HVB, Katten, and Enterprise. See, e.g., Enterprise Compl. P41; HVB-Katten Compl. P62. Accordingly, the six-year fraud statute of limitations is applicable. See [Scantek](#), 583 F. Supp. 2d at 491.

B. Plaintiffs' Claims Accrued in December 2001

The Malones' causes of action accrued in or before December 2001, when the alleged misrepresentations or omissions took place. By December 3, 2001, the Malones had executed the CTF transactional documents and entered into the agreements with HVB and Enterprise upon which their claims are based. (HVB-Katten Compl. PP 65, 105; Enterprise Compl. PP 42, 53) Plaintiffs allege that HVB and Enterprise had by that time "formed an agreement" to misrepresent the nature of CTF to investors, despite their awareness "that the investment program lacked economic substance" and that "the representations about the economic substance of the loan . . . were false." (Enterprise Compl. P41) The Malones further allege that by December 2001 Katten had already "played a significant [*15] role in the design of CTF, including, in particular, the fraudulent loan" (HVB-Katten Compl. P 62)

Plaintiffs do not contest that their causes of action accrued in December 2001 except as to their contract claims against Enterprise. See Pltf. Enterprise Br. 19; Pltf. HVB Br. 3-7; Pltf. Katten Br. 19-25. As to the contract causes of action, Plaintiffs contend that they did not accrue until 2006, when Enterprise's five-year term as trustee ended. (Pltf. Enterprise Br. 21-22) This

argument fails. "In New York, a breach of contract cause of action accrues at the time of the breach" and the statute of limitations "runs from the time of the breach though no damage occurs until later." [Ely-Cruikshank Co. v. Bank of Montreal](#), 81 N.Y.2d 399, 402, 615 N.E.2d 985, 599 N.Y.S.2d 501 (1993) (citations omitted). Indeed, the Enterprise Complaint alleges that Enterprise "violated their fiduciary duty, and as a result violated their contract, by failing to disclose to Plaintiff Malone that the 'loan' that Enterprise Trust [was] 'managing' was in fact a sham loan. As a direct and proximate result of Enterprise Trust failing to fulfill its contractual fiduciary duty, Plaintiff Malone was injured." (Enterprise Compl. P 120) This [*16] alleged failure to disclose occurred when the contract was signed in 2001 when -- according to the Enterprise Complaint -- Enterprise already knew that "the investment program lacked economic substance" and "that the representations about the economic substance of the loan . . . were false." (Enterprise Compl. P 41) The other injuries the Malones allege -- for example, the payment of loan fees for the "sham loan" -- result from the 2001 breach. See Enterprise Compl. P 130. In sum, Plaintiffs' contract claims against Enterprise -- like all of their other claims -- accrued in December 2001.

Because all of Plaintiffs' claims accrued in December 2001 and are subject to a six-year statute of limitations, the limitations period expired in December 2007. The lawsuits at issue here were filed in August 2008 and April 2009 and are therefore untimely unless a tolling provision or the fraud discovery rule of [CPLR § 213\(8\)](#) is applicable.⁴

4 As noted above, [CPLR § 213\(8\)](#) provides that fraud claims are subject to a statute of limitations of "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . could with reasonable diligence have discovered [*17] it." [CPLR § 213\(8\)](#) (2009).

C. The Applicable Statutes of Limitations Were Not Tolled

1. The Statutory Tolling Provisions Cited by Plaintiffs Are Not Applicable

Plaintiffs acknowledge that the instant cases were filed more than six years after their causes of action accrued but argue -- as to their claims against HVB and Enterprise -- that the September 7, 2007 filing of their Washington state court lawsuit tolled the statutes of limitations.⁵ See Pltf. Enterprise Br. 19; Pltf. HVB Br. 4. Plaintiffs' tolling argument relies on both New York and federal statutes. (Pltf. Enterprise Br. 23-25; Pltf. HVB Br. 2-3)

5 The Washington action did not name Katten as a defendant. Accordingly, Plaintiffs rely on the discovery prong of the fraud statute of limitations and on principles of equitable tolling in arguing that their claims against Katten are timely. (Pltf. Katten Br. 18-24)

First, the Malones cite [CPLR § 205\(a\)](#),⁶ which states:

[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, [*18] the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

This provision, however, tolls limitations periods only for cases initially filed in New York courts. [Talarico v. Thomas Crimmins Contr. Co.](#), 1995 U.S. Dist. LEXIS 10053, 1995 WL 422034, at *2 (S.D.N.Y. July 14, 1995) (holding that a prior action filed in New Jersey did not toll the statute of limitations because "[CPLR § 205](#) is not available when the predicate action is commenced in a sister state"); [Baker v. Commercial Travelers Mut. Acci. Asso.](#), 3 A.D.2d 265, 266, 161 N.Y.S.2d 332 (4th Dep't 1957) (holding that "an action brought in either a State or Federal court in a State other than New York does not save the cause of action by permitting a new action in this State" under the predecessor rule to [CPLR § 205\(a\)](#)). Accordingly, Plaintiffs' Washington lawsuit did [*19] not toll the statute of limitations under [CPLR § 205\(a\)](#). See [Talarico](#), 1995 U.S. Dist. LEXIS 10053, 1995 WL 422034, at *2; [Baker](#), 3 A.D.2d at 266.

6 The Malones acknowledge that [CPLR § 205\(a\)](#) is applicable only to their claims against HVB. Plaintiffs' claims against Enterprise in the Washington lawsuit were dismissed for lack of personal jurisdiction, and Plaintiffs "concede that the language of [New York CPLR § 205\(a\)](#) does not allow the tolling of the statute when the case

has been dismissed based upon a failure to obtain personal jurisdiction over the defendant." (Pltf. Enterprise Br. 24)

Plaintiffs also argue that the tolling provision of [28 U.S.C. § 1367](#) -- which governs the exercise of a federal court's supplemental jurisdiction -- tolled the statutes of limitations governing their claims. (Pltf. HVB Br. 2-3; Pltf. Enterprise Br. 23-25)

[Section 1367\(a\)](#) defines a federal court's supplemental jurisdiction as follows:

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

[28 U.S.C. § 1367\(a\)](#).

Under [*20] [§ 1367\(c\)](#), however, district courts may decline to exercise supplemental jurisdiction over a claim under [subsection \(a\)](#) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

[28 U.S.C. § 1367\(c\)](#).

[Section 1367\(d\)](#) tolls applicable statutes of limitations for supplemental state law claims while they are pending in federal court and for 30 days after they are dismissed:

[t]he period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under

subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

[28 U.S.C. § 1367\(d\)](#).

Plaintiffs contend that the instant actions against HVB and Enterprise are timely because they were filed within 30 days of the [*21] denial of their motions for reconsideration of the dismissal of the Washington action. ⁷ The Malones' reliance on [§ 1367\(d\)](#) is misplaced, however, because this provision only applies to supplemental state law claims dismissed in federal court and then re-filed in state court. As the Second Circuit stated in [Seabrook v. Jacobson](#), 153 F.3d 70, 72 (2d Cir. 1998), "[Section 1367\(d\)](#) ensures that the plaintiff whose supplemental state claim is dismissed has at least thirty days after dismissal to refile in state court." (emphasis added) ⁸ Other courts have likewise held that [§ 1367\(d\)](#) is applicable only to actions re-filed in state courts. See, e.g., [Jarmuth v. Frinzi](#), No. 1:04CV63 (Keeley), 2006 U.S. Dist. LEXIS 96718, 2006 WL 4730263, at *11 (N.D.W.Va. July 25, 2006) ("[T]he tolling provision of [28 U.S.C. § 1367\(d\)](#) applies to supplemental state law claims that are refiled in state court subsequent to dismissal, not to a new case filed in another federal court."); [Parrish v. HBO & Co.](#), 85 F. Supp. 2d 792, 795-96 (S.D. Ohio 1999) ("The Court finds no evidence that [§ 1367](#) was intended to act as a savings statute, allowing a plaintiff to refile in *federal court*. Thus, the Court concludes that [*22] [§ 1367\(d\)](#) operates to guarantee that plaintiffs do not lose the ability to refile their claims in *state court* . . . following the federal court's failure to exercise supplemental jurisdiction.") (emphasis in original); 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE P 106.05 (3d ed. 2009) ("[Subsection \(d\)](#) of the supplemental jurisdiction statute enacts a salutary tolling provision to save supplemental claims that have been dismissed in federal court for assertion in state court."). ⁹

⁷ Judge Lasnik of the Western District of Washington court dismissed Plaintiffs' claims against HVB on June 23, 2008, [Malone](#), 2008 U.S. Dist. LEXIS 48461, 2008 WL 2545069, at *3, and denied their motion for reconsideration on July 16, 2008. (Pltf. HVB Br. 3) The Malones filed the instant action against HVB on August 15, 2008. As to Enterprise, on June 23, 2008, Judge Lasnik dismissed the federal claims which had provided the basis for the court's exercise of personal jurisdiction over Enterprise. [Malone](#), 2008 U.S. Dist. LEXIS 48461, 2008 WL 2545069, at * 5-14; see also Compl. P 29.

However, the court did not address the personal jurisdiction issue at that time. [Malone, 2008 U.S. Dist. LEXIS 70688, 2008 WL 4279502, at *2](#). On February 23, 2009, Judge Lasnik dismissed the remaining claims [*23] against Enterprise for lack of personal jurisdiction. [Malone v. Clark Nuber, P.S., 2009 U.S. Dist. LEXIS 13874, 2009 WL 481285 \(W.D. Wash. Feb. 23, 2009\)](#). Plaintiffs' motion for reconsideration of this decision was denied on March 11, 2009 (Compl. P 29), and they filed the instant action against Enterprise on April 10, 2009. Because [§ 1367\(d\)](#) did not toll the applicable statutes of limitations, this Court does not reach the issue of whether the 30-day period set forth in [§ 1367\(d\)](#) runs from the dismissal of the complaint or from the denial of a motion for reconsideration.

8 In discussing the constitutionality of [§ 1367\(d\)](#), the Supreme Court has likewise recognized that this provision addresses supplemental state law claims re-filed in state court:

Although the Constitution does not expressly empower Congress to toll limitations periods for state-law claims brought in state court, it does give Congress the authority "to make all Laws which shall be necessary and proper for carrying into Execution [Congress's Article I, § 8] Powers and all other Powers vested by this Constitution in the Government of the United States."

[Jinks v. Richland County, South Carolina, 538 U.S. 456, 461, 123 S. Ct. 1667, 155 L. Ed. 2d 631 \(2003\)](#) (emphasis added).

9 This interpretation [*24] of [§ 1367\(d\)](#) is supported by its legislative history. The House Report concerning [§ 1367](#) states that "the purpose [of the statute's tolling provision] is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal court." H.R. Rep. No. 734, 101st Cong., 2d Sess. (1990); see also 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE P 106.05 (3d ed. 2009).

Here, the Malones are seeking to litigate claims dismissed by a federal court in the Western District of Washington. Because they have re-filed those claims in another federal court, the tolling provision set forth in [§ 1367\(d\)](#) is not applicable.¹⁰

10 [Section 1367\(d\)](#) is likewise inapplicable because Plaintiffs' state law claims against HVB and Enterprise were dismissed for improper venue and lack of personal jurisdiction and not for any of the reasons listed in [§ 1367\(c\)](#). [Malone, 2008 U.S. Dist. LEXIS 48461, 2008 WL 2545069, at *3](#); [Malone, 2009 U.S. Dist. LEXIS 13874, 2009 WL 481285, at *1](#). The tolling provision set forth in [§ 1367\(d\)](#) does not preserve claims dismissed for these reasons. See, e.g., [Zyckek v. Kimball Int'l Mktg. Inc., CV06-64-N-EJL, 2006 U.S. Dist. LEXIS 26953, 2006 WL 1075452, at *3 \(D. Idaho April 21, 2006\)](#) [*25] ("The dismissal of all claims (federal and state)... was not pursuant to [28 U.S.C. § 1367](#). Therefore, the Plaintiff cannot rely on [28 U.S.C. § 1367\(d\)](#) to toll the statute of limitations."); [Parrish, 85 F. Supp. 2d at 796-97](#) ("[T]he Court concludes that, for [§ 1367\(d\)](#) to be applicable, the supplemental claim brought pursuant to [§ 1367\(a\)](#) must have been dismissed by the court pursuant to [§ 1367\(c\)](#).").

2. Collateral Estoppel Bars Plaintiffs' Equitable Tolling Argument

Plaintiffs also contend that the applicable statutes of limitations were equitably tolled because of the defendants' fraudulent concealment of their wrongdoing.¹¹ "Under federal common law, a statute of limitations may be tolled due to the defendant's fraudulent concealment if the plaintiff establishes that: (1) the defendant wrongfully concealed material facts relating to defendant's wrongdoing; (2) the concealment prevented plaintiff's 'discovery of the nature of the claim within the limitations period,' and (3) plaintiff exercise[d] due diligence in pursuing the discovery of the claim during the period plaintiff seeks to have tolled." [Corcoran v. New York Power Auth., 202 F.3d 530, 543 \(2d Cir. 1999\)](#) (quoting [Lanza v. Merrill Lynch & Co., 154 F.3d 56, 60 \(2d Cir. 1998\)](#)).

11 Plaintiffs [*26] have pled fraudulent concealment claims against Enterprise (Enterprise Compl. PP 103-12) and seek to add such claims against HVB and Katten in their proposed second amended complaint. (HVB-Katten Proposed SAC PP209-18; 307-11)

In the fraudulent misrepresentation or concealment context, "the equitable estoppel doctrine is not available to 'a plaintiff who possesses timely knowledge sufficient to place him or her under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable Statute of Limitations.'" [Porwick v. Fortis Benefits Ins. Co., 99 Civ. 10122 \(GBD\), 2004 U.S. Dist.](#)

[LEXIS 24432, 2004 WL 2793186, at *6 \(Dec. 6, 2004 S.D.N.Y.\)](#) (quoting [Gleason v. Spota, 194 A.D.2d 764, 599 N.Y.S.2d 297 \(2nd Dep't 1993\)](#); see also [Corcoran, 202 F.3d at 543](#)).

Here, the Malones allege that Katten, HVB and Enterprise concealed the fraudulent scheme behind CTF and the fraudulent nature of the "sham loan" underlying the CTF transaction. Plaintiffs also argue that the question of when they had notice of the fraud is a question of fact "not amenable to determination on the pleadings." (Pltf. HVB Br. 23)

The question of when the Malones were on notice of the allegedly fraudulent nature [*27] of the CTF transaction and the "sham loan" underlying it, however, was already litigated and decided in the Western District of Washington action. That court concluded that Plaintiffs were on notice of the alleged fraud and the sham nature of the loan by the end of 2003. The Malones are collaterally estopped from asserting otherwise here.

"The 'fundamental notion' of the doctrine of collateral estoppel, or issue preclusion, 'is that an issue of law or fact actually litigated and decided by a court of competent jurisdiction in a prior action may not be relitigated in a subsequent suit between the same parties or their privies.'" [Ali v. Mukasey, 529 F.3d 478, 489 \(2d Cir. 2008\)](#) (quoting [United States v. Alcan Aluminum Corp., 990 F.2d 711, 718-19 \(2d Cir. 1993\)](#)). Collateral estoppel applies when "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was 'actually litigated and actually decided,' (3) there was 'a full and fair opportunity for litigation in the prior proceeding,' and (4) the issues previously litigated were 'necessary to support a valid and final judgment on the merits.'" [Ali, 529 F.3d at 489](#) (quoting [Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 44 \(2d Cir. 1986\)](#)).

In [*28] his June 23, 2008 opinion, Judge Lasnik addressed the issue of when the Malones were put on notice of the facts giving rise to the fraud claims they allege:

Plaintiffs admit that they "were first alerted to the possibility of Defendants['] misconduct during an audit of the Malone's [sic] 2001 tax return." The same paragraph goes on to state that in April and June 2005, the IRS issued summonses to two of the defendants, both financial institutions, regarding the Malones. However, plaintiffs actually had notice even earlier. In August 2003, the IRS issued a notice entitled "Common Trust Fund Straddle Tax Shelter" (the "IRS notice") which stated that "the claimed tax

benefits purportedly generated by these transactions are not allowable for federal income tax purposes." That notice specifically disallowed the CTF shelter. Malone was also personally notified of the issue. By letter dated December 22, 2003, CTF President Michael Schwartz advised Malone to file an amended tax return and to retain an attorney. The CTF letter explained that the IRS notice stated "that the IRS intended to challenge the tax benefits associated with" CTF, the transaction plaintiffs "entered into in 2002." The [*29] CTF letter further stated that some of Schwartz's clients were currently under IRS investigation. "This has led me to conclude that the IRS will shortly begin an investigation of my company as well, ultimately requiring me to provide them with a list of all clients that have entered into listed transactions. As such it is almost certain that you will [be] audited at some time in 2004." In addition, contrary to Clark Nuber's assertion that the Sidley Austin opinion letter would preclude penalties, the CTF letter explicitly stated, "The IRS recently has been taking the very aggressive position that tax opinions do not necessarily provide penalty protection on the basis that the taxpayer did not reasonably rely in good faith on the opinion." Malone subsequently retained an attorney.

The CTF letter and the IRS notice put plaintiffs on notice of nearly all of the facts that defendants allegedly concealed from them and that give rise to their claims, including the fact that CTF lacked economic substance, that the IRS would not allow the deductions, that the IRS would audit plaintiffs, and that the Sidley Austin letter would not necessarily prevent the imposition of penalties.

[Malone, 2008 U.S. Dist. LEXIS 48461, 2008 WL 2545069, at *8](#).

Judge [*30] Lasnik went on to note that the Malones had raised an additional theory of liability based on the alleged "sham loan" underlying CTF, which they claimed they had not discovered until March 2007:

Plaintiffs allege that they did not learn that the loan was a sham until March 2007. Defendants have not offered any evidence at this point to counter that assertion. Nor can the Court conclude as a matter of law that notice that the IRS was disallowing the tax deductions constituted notice that the loan was a sham. It appears that any claims based on the alleged sham nature of the loan would not be time barred. Accordingly, plaintiffs will be permitted to amend their complaint to clarify that theory.

[Malone, 2008 U.S. Dist. LEXIS 48461, 2008 WL 2545069, at *9.](#)

Judge Lasnik returned to the fraud discovery issue in a February 2009 order. After reviewing the Malones' third amended complaint, in which they attempted to plead fraud based on the "sham loan" theory, Judge Lasnik concluded that this theory of liability was

simply a restatement of [the Malones'] claim that CTF lacked economic substance. The sham nature of the loan was one of the reasons why CTF lacked economic substance. The third amended complaint shows that the [*31] loan was not a separate transaction, but was a necessary part of the CTF transaction As plaintiffs' own allegations show, the sham nature of the loan caused it to lack economic substance. Therefore, because plaintiffs knew by the end of 2003 that CTF lacked economic substance, [they] could have discovered by that time that the loan was a sham.

[Malone, 2009 U.S. Dist. LEXIS 13874, 2009 WL 481288, at *3.](#)

All four elements necessary for the application of collateral estoppel are present here. First, the proceedings here and those in Washington present an identical issue: when the Malones were on notice that CTF was fraudulent and that the loan underlying the CTF transaction was a "sham."

Second, this issue was litigated and decided by Judge Lasnik. With respect to knowledge that CTF was fraudulent and that the loan underlying it was a sham, Judge Lasnik concluded that Plaintiffs were on notice of this by the end of 2003. [Malone, 2008 U.S. Dist. LEXIS](#)

[48461, 2008 WL 2545069, at *8; Malone, 2009 U.S. Dist. LEXIS 13874, 2009 WL 481288, at *3.](#)

Third, the Malones had a "full and fair opportunity" to litigate this issue in the action before Judge Lasnik. The Second Circuit has held that a "full and fair opportunity" to litigate means that the plaintiff was "fully able to [*32] raise the same factual or legal issues" in the prior litigation. [Lafleur v. Whitman, 300 F.3d 256, 274 \(2d Cir. 2002\).](#) A litigant may be barred from re-litigating an issue even if the prior litigation was against a different party. *Id.*; [Hoppe v. G.D. Searle & Co., 779 F. Supp. 1425, 1427 \(S.D.N.Y. 1991\);](#) see also [Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331, 99 S. Ct. 645, 58 L. Ed. 2d 552 \(1979\).](#) Here -- as to the "sham loan" theory of liability -- Plaintiffs were litigating the timeliness of their claims in the Washington action against Seattle law firm Ahrens & DeAngeli, rather than against HVB, Katten, or Enterprise. Plaintiffs, however, had a full and fair opportunity to present their arguments that they did not discover the sham nature of the underlying loan until 2007. Indeed, the Malones were permitted to amend their complaint three times in the Washington action and were specifically directed to clarify their "sham loan" theory. See [Malone, 2009 U.S. Dist. LEXIS 13874, 2009 WL 481288, at *1; Malone, 2008 U.S. Dist. LEXIS 48461, 2008 WL 2545069, at *9.](#)

Finally, the issue of when the Malones were on notice of the fraudulent nature of CTF and the sham nature of the loan was necessary to support Judge Lasnik's judgment dismissing all but one of the Malones' claims [*33] against the Ahrens & DeAngeli defendants as time-barred. [Malone, 2009 U.S. Dist. LEXIS 13874, 2009 WL 481288, at *4; Malone, 2008 U.S. Dist. LEXIS 48461, 2008 WL 2545069, at *8-9.](#)

In sum, the Malones are collaterally estopped from asserting that they discovered the fraudulent conduct at issue -- including the "sham" nature of the loan -- after the end of 2003. Because the Malones were on notice of the alleged fraudulent misconduct long before the expiration of the applicable statutes of limitations in December 2007, they may not claim the benefits of equitable tolling under the doctrine of fraudulent concealment. See [Porwick, 2004 U.S. Dist. LEXIS 24432, 2004 WL 2793186, at *6;](#) see also [Corcoran, 202 F.3d at 543.](#)

D. The Fraud Discovery Rule Does Not Render Plaintiffs' Claims Timely

The statute of limitations for fraud claims is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . could with reasonable diligence have discovered it." [CPLR § 213\(8\).](#) The Malones contend that even if their fraud claims are not timely under the first prong of this

provision, they are timely under the discovery prong of [Section 213\(8\)](#).

"The test as to when fraud should with reasonable diligence have been discovered is an objective one." [*34] [Armstrong v. McAlpin](#), 699 F.2d 79, 88 (2d Cir. 1983). "Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him." [Guilbert v. Gardner](#), 480 F.3d 140, 147 (2d Cir. 2007) (quoting [Armstrong](#), 699 F.2d at 88).

The Malones claim that they did not discover that the HVB loan was a "sham" until March 2007. (Pltf. HVB Br. 4; Pltf. Enterprise Br. 20) As discussed above, having litigated and lost on this issue before Judge Lasnik, Plaintiffs cannot raise this claim anew. They are collaterally estopped from asserting that the discovery date concerning the allegedly fraudulent nature of CTF and the "sham loan" underlying it is any later than the end of 2003.¹²

12 Even if Plaintiffs were not collaterally estopped from re-litigating this issue, and even if the Court accepted their argument that they were not aware of the "sham" nature of the loan until March 2007, Plaintiffs' action against Enterprise was not commenced until April [*35] 2009 -- outside the two year discovery period set forth in [CPLR § 213\(8\)](#).

The Malones filed the instant action against HVB and Katten on August 15, 2008, and the action against Enterprise on April 10, 2009. Because both suits were filed more than two years after December 2003, the Malones' fraud claims are time-barred even under the discovery prong of the fraud statute of limitations.¹³

13 Plaintiffs also contend that Judge Lasnik stated in a June 2008 opinion that "it appears that any claims based on the alleged sham nature of the loan would not be time barred," and that this finding constitutes "law of the case." (Pltf. HVB Br. 4-5; Pltf. Enterprise Br. 19-20) Plaintiffs have both grossly distorted Judge Lasnik's rulings on this issue and have misapplied the "law of the case" doctrine. That doctrine "dictates that 'a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation.'" [Westerbeke Corp. v. Daihatsu Motor Co.](#), 304 F.3d 200, 218 (2d Cir. 2002) (quoting [In re Korean Air Lines Disaster](#), 798 F. Supp. 755, 759 (E.D.N.Y. 1992)). As an initial matter, the case

before Judge Lasnik was brought under Washington [*36] law, not New York law. Secondly, the cases before this Court are obviously not "subsequent stages" of the litigation before Judge Lasnik. Finally, as Plaintiffs know full well, Judge Lasnik's June 2008 comment that the "sham loan" claim did not appear to be time-barred was not a final ruling. Judge Lasnik instructed the Malones to elaborate upon the "sham loan" theory of liability, because they had not "stress[ed this claim] in their briefing or in the Amended Complaint." [Malone](#), 2008 U.S. Dist. LEXIS 48461, 2008 WL 2545069, at *9; see also [Malone](#), 2009 U.S. Dist. LEXIS 13874, 2009 WL 481288, at *3 (W.D. Wash. Feb. 23, 2009).

After the Malones did so -- in the context of a third amended complaint -- Judge Lasnik revisited this issue and concluded that the Malones were on inquiry notice of the "sham loan" by the end of 2003 and that their claims under Washington law were in fact time-barred. [Malone](#), 2009 U.S. Dist. LEXIS 13874, 2009 WL 481288, at *3-4.

II. PLAINTIFFS' CROSS MOTION TO FILE A SECOND AMENDED COMPLAINT AGAINST HVB AND KATTEN IS DENIED AS FUTILE.

The Malones have submitted a proposed second amended complaint that they seek to file against HVB and Katten. "Leave to amend should be freely granted, but the district court has the discretion to deny leave if there [*37] is a good reason for it, such as futility, bad faith, undue delay, or undue prejudice to the opposing party." [Jin v. Metropolitan Life Ins. Co.](#), 310 F.3d 84, 101 (2d Cir. 2002). "An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#)." [Lucente v. Int'l Business Machines Corp.](#), 310 F.3d 243, 258 (2d Cir. 2002) (citing [Dougherty v. North Hempstead Bd. of Zoning Appeals](#), 282 F.3d 83, 88 (2d Cir. 2002)). Here, Plaintiffs will not be granted leave to amend because the claims in their proposed second amended complaint -- like those set forth in the earlier complaints -- are time-barred. Accordingly, the proposed second amended complaint could not withstand a motion to dismiss.

In support of their motion for leave to amend, Plaintiffs repeat the arguments they made in opposing defendants' motions to dismiss. For example, the Malones argue again that they did not discover the sham nature of the loan underlying the CTF transaction until -- at the earliest -- late December 2006. They also contend that they were not aware of Katten's role in the alleged

fraud until September 2007, when they filed their Washington [*38] complaint. (Pltf. Katten Reply Br. 6)

Plaintiffs, however, are bound by Judge Lasnik's determination that they were on notice of the allegedly fraudulent nature of the sham loan and the CTF transaction in general as of December 2003. See supra 15-20. The Malones' argument that they were not on notice of Katten's alleged fraud in connection with the sham loan until after September 2007 is also unavailing. In the second amended complaint, Plaintiffs have not alleged any facts suggesting that their claims against Katten are in any way separate or distinct from the fraud claims they alleged against the other defendants named here or in Washington. See Pltf. Katten Reply Br. 3-6; Proposed SAC. The Malones were on inquiry notice of the alleged sham nature of the loan by the end of 2003, see supra 15-20; [Malone, 2009 U.S. Dist. LEXIS 13874, 2009 WL 481288, at *3](#), and they have conceded that they were aware of Katten's involvement in preparing the CTF transaction before 2003. (HVB-Katten Compl. PP 53, 55; Proposed SAC PP 54, 56, 59) Indeed, the proposed second amended complaint pleads that the Malones "reasonably relied" on Katten's representations, all made before 2003. (Proposed SAC P 59); see also Proposed SAC PP 54, [*39] 56. Given that the Malones were on inquiry notice of the alleged sham nature of the loan in 2003, and have pleaded facts indicating that they were aware of Katten's involvement in the CTF transaction before 2003, there is no basis to find that the limitations period applicable to Plaintiffs' claims against Katten began to run later than their claims against HVB or Enterprise.

The Malones also claim that the proposed second amended complaint adequately pleads the elements of fraudulent concealment. (Pltf. HVB Reply Br. 8-9; Pltf.

Katten Reply Br. 8-9) The doctrine of fraudulent concealment, however, does not toll the statutes of limitations as to the Malones' claims because they were on inquiry notice before the expiration of the limitations period. See supra 15-20. Because the proposed second amended complaint does not cure the time-barred nature of the Malones' claims against HVB and Katten, the proposed amendment would be futile, and accordingly the motion for leave to file the proposed second amended complaint will be denied.

CONCLUSION

For the reasons set forth above, Defendants' motions to dismiss the above-captioned cases are GRANTED, and the Plaintiffs' motion for leave to file [*40] a second amended complaint against HVB and Katten is DENIED. The Clerk of the Court is directed to terminate the following motions:

08 Civ. 7277 -- Docket No. 10, 13, 32;

09 Civ. 3676 -- Docket No. 4.

The Clerk of the Court is further directed to close the above-captioned cases.

Dated: New York, New York

February 4, 2010

SO ORDERED.

/s/ Paul G. Gardephe

Paul G. Gardephe

United States District Judge

LEXSEE

**JOSEPH MARRONE AND JANNINE MARRONE, PLAINTIFFS-APPELLANTS,
v. GREER & POLMAN CONSTRUCTION, INC., T/A G.P. CONSTRUCTION,
INC., GARRET N. GREER, JAN POLMAN, LESTER STUCCO, DEFENDANTS,
AND STO CORPORATION, STO OF NEW JERSEY, INC., DEFENDANTS-
RESPONDENTS. GREER & POLMAN CONSTRUCTION, INC.,
DEFENDANT/THIRD-PARTY PLAINTIFF, v. SELECTIVE INSURANCE
GROUP, INC., ASSURANCE COMPANY OF AMERICA AND ITT HARTFORD
INSURANCE COMPANY, THIRD-PARTY DEFENDANTS.**

DOCKET NO. A-3651-07T2

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

405 N.J. Super. 288; 964 A.2d 330; 2009 N.J. Super. LEXIS 24

**December 15, 2008, Argued
February 4, 2009, Decided**

SUBSEQUENT HISTORY: [***1]

Approved for Publication February 4, 2009.

PRIOR HISTORY: On appeal from the Superior Court of New Jersey, Law Division, Bergen County, L-12432-04.

COUNSEL: *John R. Sawyer* argued the cause for appellants (*Stark & Stark*, attorneys; *Mr. Sawyer* and *Mark M. Wiechnik*, of counsel and on the brief).

David N. Cohen argued the cause for respondent STO Corp. (*Edwards, Angell, Palmer & Dodge, LLP*, attorneys; *Mr. Cohen* *Andrew P. Fishkin* and *Charles W. Stotter*, on the brief).

Jonathan P. Zayle argued the cause for respondent STO of New Jersey (*Carroll, McNulty & Kull, L.L.C.*, attorneys; *Guy T. Lytle*, of counsel and on the brief).

JUDGES: Before Judges LISA, REISNER and ALVAREZ. The opinion of the court was delivered by REISNER, J.A.D.

OPINION BY: REISNER

OPINION

[*290] [**331] The opinion of the court was delivered by [**332]

REISNER, J.A.D.

Plaintiffs Joseph and Jannine Marrone appeal from two orders dated July 30, 2007, granting summary judgment dismissing their second amended complaint against Sto Corporation, and Sto of New Jersey, Inc. We affirm. Plaintiffs' claims under the Consumer Fraud Act (CFA), [N.J.S.A. 56:8-1 to -184](#), were properly dismissed for lack of proof that any losses they suffered were the result of defendants' alleged unconscionable conduct in manufacturing [***2] or marketing an exterior home siding product. We also conclude that plaintiffs' claims based on the Products Liability Act (PLA), [N.J.S.A. 2A:58C-1 to -11](#), were properly dismissed under [*291] the economic loss doctrine because the only claimed damage was to the house, of which the siding was a component.

I

The crux of this case involves alleged defects in an exterior siding product that was applied to a house when it was constructed in 1995. Sto Corporation (Sto) and Sto of New Jersey, Inc. (Sto of NJ), were the manufacturer and distributor, respectively, of this product, which was known as Exterior Insulation Finish System (EIFS cladding). Plaintiffs were not the original owners of the house. They bought the house, located in Mahwah, New Jersey, in 2003 from the original owners, the DeCilveos, who in turn had contracted for its construction with Greer & Polman Construction (G & P). G & P subcontracted with Lester Stucco to apply the EIFS cladding; Lester obtained the material from the distributor, STO of NJ. ¹

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1 Plaintiffs initially sued G & P [***3] and its principals, and Lester Stucco, but it settled with those parties, leaving only plaintiffs' claims against Sto and Sto of NJ (the Sto defendants).

There is no dispute that the DeCilveos had no knowledge about the EIFS cladding and did not receive or rely on any representations about it. In fact, they thought the material was stucco. The DeCilveos lived in the house for eight years without discovering any problem with the exterior cladding. Plaintiffs had no contact with either Sto or Sto of NJ and did not receive or rely on any information or representations from anyone concerning the EIFS cladding. Nor did they have a written warranty for the exterior cladding. Like the DeCilveos, they believed the exterior was stucco, which is "cement on wood." Before they bought the house, plaintiffs had it inspected by a professional home inspection company.

After they bought the home, plaintiffs allegedly received a letter from their homeowners' insurance company in November 2003, threatening to cancel their coverage because of the EIFS cladding on the house. Plaintiffs also discovered that the EIFS cladding [*292] was defective. According to their second amended complaint (complaint), the EIFS [***4] cladding was not water-tight, as it was supposed to be, thus resulting in "an unacceptably high moisture content in the underlying substructure of [plaintiffs'] home, causing damage thereto." In their complaint, as it related to the Sto defendants, plaintiffs asserted claims for negligent manufacture and distribution of the EIFS; breach of express and implied warranties; negligent misrepresentations and omissions; intentional misrepresentations or omissions in violation of the CFA; and strict liability under the PLA.

A September 2005 expert report provided to plaintiffs by R.V. Buric indicated that the construction contractor had improperly installed the EIFS cladding. However, Buric also opined that the EIFS system [***333] was poorly designed because it depended on the applied cladding being perfectly water-tight and had no back-up system to carry moisture away from the exterior walls if water penetrated behind the cladding. Buric found damage to the EIFS cladding itself, as well as water damage to sheathing and wood framing and to some windows.²

2 Contrary to plaintiffs' claims, Buric did not find that the EIFS caused damage to "landscaping." Rather they recommended that the EIFS cladding [***5] be removed and replaced, and they projected that landscaping could be damaged in the course of replacing the cladding. Buric did not note any water damage to the

exterior deck, and at her deposition, Mrs. Marrone indicated that plaintiffs had no problems with the deck other than its "beat up" appearance. She admitted plaintiffs were not making any claims for damage to personal property or for personal injury.

The motion judge granted summary judgment dismissing the complaint. In two written opinions issued July 30, 2007, he agreed with defendants' contentions, which plaintiff did not oppose, that Sto did not issue a written warranty and plaintiffs' implied warranty claim was barred by a four-year statute of limitations. Addressing the intentional misrepresentation claim, the judge found no evidence that plaintiffs "ever received and/or saw and/or reviewed and/or relied upon and/or considered, to their detriment, any representations of any kind" concerning the EIFS [*293] product. Moreover, plaintiffs had no "special or fiduciary relationship" with Sto which would provide a basis to infer that Sto had a "duty to make disclosures" to plaintiffs. Hence, the judge dismissed plaintiffs' claims [***6] based on "alleged omissions." Based on the same factual findings, the judge also dismissed the CFA claims.

Finally, the judge dismissed plaintiffs' negligence and strict liability claims based on the economic loss doctrine:

Both of these tort claims are barred by the economic loss doctrine . . . because plaintiffs allege that the EIFS, an integrated component of their home, caused damage solely to their home itself. Where a component of an integrated product causes injury solely to the integrated product, the damage to the integrated product is not considered separate property damage that would remove the claim from the realm of contract law into the field of tort law. Such is the case here, according to the plaintiffs, who admit that they are not seeking damages for personal injury or loss of personal property other than the damage to the home itself. In addition, there is no duty emanating from the defendant [Sto] Corp., to plaintiffs Marrone for the negligence count to remain.

The court denied plaintiffs' motion for reconsideration by order dated October 5, 2007.

II

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Our review of the trial court's summary judgment decision is plenary:

In deciding a motion for summary judgment, the trial [***7] court must determine whether the evidence, when viewed in a light most favorable to the non-moving party, would permit a rational fact-finder to resolve the dispute in the non-moving party's favor. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995). The trial court cannot decide issues of fact but must decide whether there are any such issues of fact. Ibid.; R. 4:46-2(c). Our review of a trial court's summary judgment decision is de novo, applying the *Brill* standard. [**334] Prudential Property Ins. v. Boylan, 307 N.J. Super. 162, 167, 704 A.2d 597 (App.Div.), *certif. denied*, 154 N.J. 608, 713 A.2d 499 (1998).

[Agurto v. Guhr, 381 N.J. Super. 519, 525, 887 A.2d 159 (App.Div.2005).]

Based on our review of the record,³ we conclude that this case was ripe for summary judgment and that the undisputed facts entitled the Sto defendants to judgment as a matter of law.

3 We required the parties to provide us with the statements and counterstatements of undisputed material facts filed with the summary judgment motions. See R. 4:46-2.

[*294] III

Plaintiffs contend that the trial judge erred in applying the economic loss doctrine to their claims and in dismissing their claims for material omissions under the CFA.

We turn first to the CFA [***8] issue. The CFA prohibits unconscionable commercial conduct:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as

aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice. . . .

[N.J.S.A. 56:8-2.]

The CFA permits recovery by those harmed by the conduct:

Any person who suffers any ascertainable loss of moneys or property, real or personal, *as a result of* the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction.

[N.J.S.A. 56:8-19 (emphasis added).]

Our prior decision in Chattin v. Cape May Greene, Inc., 216 N.J. Super. 618, 524 A.2d 841 (App.Div.), *certif. denied*, 107 N.J. 148, 526 A.2d 209 (1987), [***9] is directly on point with respect to plaintiffs' CFA claim. In that case, we addressed CFA claims filed by persons who bought houses built with allegedly "insulated windows" which proved to be defective. We held that home-owners who received oral or written representations about the windows were entitled to pursue CFA claims. Id. at 641, 524 A.2d 841. However, we affirmed the dismissal of claims filed by subsequent purchasers who had no contact with the builder, CMG:

Plaintiffs' argument that subsequent purchasers of homes should have been permitted to recover consumer fraud damages, even though they never received either the brochure or any oral representation from CMG concerning the windows, is clearly lacking in merit. There is no basis for finding a violation of the Consumer Fraud Act with respect to these purchasers because CMG made no representation to them. Stated another way, these purchasers have not suffered "any ascertainable loss of moneys or property" *as a result of* CMG's use of a [*295] practice declared unlawful by the Consumer Fraud Act, and hence they have no claim under N.J.S.A. 56:8-19.

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[Id. at 641, 524 A.2d 841 (emphasis added).]

As in *Chattin*, plaintiffs here did not prove that they received, much less [***10] relied [***335] on, any representations from the Sto defendants. Plaintiffs' reliance on *Perth Amboy Iron Works, Inc. v. American Home Assurance Co.*, 226 N.J. Super. 200, 543 A.2d 1020 (App.Div.1988), *aff'd o.b.*, 118 N.J. 249, 571 A.2d 294 (1990), is misplaced. That case involved a chain of misrepresentations, explicit and implicit, concerning a yacht motor. In that context, we stated: "We therefore interpret the Consumer Fraud Act to encompass the acts of remote suppliers, including suppliers of component parts, whose products are passed on to a buyer and whose representations are made to or intended to be conveyed to the buyer." *Id. at 211, 543 A.2d 1020*. In this case, the evidence indicated that Sto actively marketed its EIFS cladding to builders and architects and other construction professionals. Unlike *Perth Amboy Iron Works*, however, there is no evidence that Sto's representations were conveyed to the DeCilveos or to plaintiffs or that they were even aware that the EIFS cladding was part of the house.

Plaintiffs' reliance on *Port Liberte Homeowners Association, Inc. v. Sordoni Construction Co.*, 393 N.J. Super. 492, 924 A.2d 592 (App.Div.), *certif. denied*, 192 N.J. 479, 932 A.2d 30 (2007), is likewise inapt. There we held that a condominium association [***11] had standing to assert CFA claims against Dryvit, a manufacturer of EIFS cladding, based on misrepresentations made to the original developer of the condominium complex. We premised our holding on the unique status of condominium associations and explicitly distinguished such associations from individual home buyers: "The relationship between a developer and a condominium association is unique as compared to the relationship between a developer and a single-family homeowner." *Id. at 502, 924 A.2d 592*. Moreover, in *Port Liberte*, we recognized the continued viability of *Chattin, supra* and distinguished that case:

[*296] This matter is distinguishable from *Chattin* Plaintiffs are not subsequent purchasers of the condominium property. Under the legislative scheme, they occupy the same role as the developer, having stepped into the developer's shoes. . . . [Defendant] Dryvit was on notice that the project was a condominium, and that plaintiffs, the end-users of the EIFS, would ultimately govern the common elements upon

completion of the construction. As such, any misrepresentations made to the developer were essentially made to the associations.

[*Id. at 506-07, 924 A.2d 592* (citations omitted).]

[1] Plaintiffs are correct [***12] in asserting that privity of contract is not required in a CFA claim.

[P]rivacy is not a condition precedent to recovery under the New Jersey Consumer Fraud Act . . . since section 19 clearly grants a remedy to "any person who suffers any ascertainable loss." There is no provision that the claimant have a direct contractual relationship with the seller of the product or service.

[*Katz v. Schachter*, 251 N.J. Super. 467, 474, 598 A.2d 923 (App.Div.1991), *certif. denied*, 130 N.J. 6, 611 A.2d 646 (1992).]

However, in this case, there is not only a lack of privity, there is a complete lack of proof of a causal connection between the Sto defendants' alleged misrepresentations about their product and plaintiffs' decision to purchase the house. See *N.J.S.A. 56:8-19*. In fact, both plaintiffs and their sellers believed that the house's exterior was stucco. ⁴ Plaintiffs' reliance on [***336] *Zorba Contractors, Inc. v. Housing Authority of Newark*, 362 N.J. Super. 124, 827 A.2d 313 (App.Div.2003), is misplaced. In *Zorba*, we noted that "consumer fraud requires . . . proof of a causal nexus between the concealment of the material fact and the loss." *Id. at 139, 827 A.2d 313* (quoting *Varacallo v. Mass. Mut. Life Ins. Co.*, 332 N.J. Super. 31, 43, 752 A.2d 807 (App.Div.2000)).

4 In [***13] that respect, *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 691 A.2d 350 (1997), is not on point. In that case, the realtor allegedly made misrepresentations to the home buyers about the excellent qualifications of the builder. The homes later proved to have multiple serious defects.

[2] Further, to the extent plaintiffs assert that Sto violated the CFA through an omission rather than an affirmative misstatement, their claim fails. "To prove that . . . acts of omission constituted consumer fraud, plaintiff must show that the defendant intentionally concealed the

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information . . . with the intention that [*297] plaintiff would rely on the concealment, and that the information was material to the transaction." Judge v. Blackfin Yacht Corp., 357 N.J. Super. 418, 426, 815 A.2d 537 (App.Div.), certif. denied, 176 N.J. 428, 824 A.2d 157 (2003). That proof was absent here. Plaintiffs' CFA claim was properly dismissed.

IV

We turn next to plaintiffs' PLA claims. Under the PLA, "[p]roduct liability action' means any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty." N.J.S.A. 2A:58C-1b(3). The PLA defines "harm" to [***14] property as "physical damage to property, other than to the product itself." N.J.S.A. 2A:58C-1b(2).

[3, 4] There is no dispute that plaintiffs did not negotiate for, select, or buy the EIFS cladding separately from the house. Nor did they even know that the exterior covering was EIFS, as opposed to stucco. They contend that the EIFS cladding was defective and that it allowed moisture damage to the house's sheathing and window frames. In this context, the issue is whether plaintiffs can file a PLA suit for replacement of the EIFS cladding and for damage to the house caused by a component of the house. We hold that plaintiffs cannot pursue a PLA claim for two reasons. First, we conclude that the house is the "product," and it cannot be subdivided into its component parts for purposes of supporting a PLA cause of action. Second, even if plaintiffs were deemed to have bought the EIFS cladding as a separate item, they would not be entitled to sue for the cost of removing and replacing it, because defects in the cladding constitute "damage . . . to the product itself." N.J.S.A. 2A:58C-1b(2).

We begin our consideration of the issue with the Supreme Court's decision in Alloway v. General Marine Industries, L.P., 149 N.J. 620, 695 A.2d 264 (1997), [***15] adopting the economic loss doctrine. There, the purchaser and his insurer both sued "for economic loss caused by a defect in a power boat" which sank due [*298] to a defective seam in the boat's swimming platform. Id. at 623, 695 A.2d 264. Plaintiffs sought damages for the cost of repairing the boat and for loss in its value. The Court agreed with the Law Division, that "plaintiffs could not recover [in tort or strict-liability] for economic loss resulting from damage to the boat itself' but were limited to claiming damages for breach of warranty under the Uniform Commercial Code. Id. at 623, 695 A.2d 264. The Court defined economic loss as including "damages for costs of repair, replacement of defective goods, inadequate [***337] value, and

consequential loss of profits" as well as "the diminution in value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." Id. at 627, 695 A.2d 264 (citations omitted).

After reviewing precedent from many other jurisdictions,⁵ the Court overruled its prior holding in Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), which permitted a consumer to maintain a strict-liability claim against a manufacturer "for loss of value [***16] of a defective carpet." Alloway, supra, 149 N.J. at 625, 695 A.2d 264. The Court concluded that "the United States Supreme Court, the overwhelming majority of state courts, and legal scholars have recognized the unfairness of imposing on a seller tort liability for economic loss. Accordingly, we hold that plaintiffs' tort claims are barred." Id. at 643, 695 A.2d 264

5 See, e.g., Nat'l Union Fire Ins. Co. v. Pratt & Whitney Canada, Inc., 107 Nev. 535, 815 P.2d 601, 603-05 (1991), which the Court described as "holding that economic loss [is] not recoverable from [an] engine manufacturer under tort theories of negligence and strict liability even though [the] defective engine damaged [the] entire aircraft and [the] product caused [a] calamitous crash." Alloway, supra, 149 N.J. at 635, 695 A.2d 264

In reaching its conclusion, the Court reasoned that tort claims are more appropriate to accidental loss while contract claims are more appropriate to deal with claims of lost value:

Allocation of economic loss between a manufacturer and a consumer involves assessment of tort and contract principles in the determination of claims arising out of the manufacture, distribution, and sale of defective products. Generally speaking, tort principles are [***17] better suited to resolve claims for personal injuries or [*299] damage to other property. Contract principles more readily respond to claims for economic loss caused by damage to the product itself.

Various considerations support the distinction. Tort principles more adequately address the creation of an unreasonable risk of harm when a person or other property sustains accidental or unexpected injury. When, however, a product fails to fulfill a purchaser's economic expectations, contract principles, particularly as implemented by

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the *U.C.C.*, provide a more appropriate analytical framework. Implicit in the distinction is the doctrine that a tort duty of care protects against the risk of accidental harm and a contractual duty preserves the satisfaction of consensual obligations.

[*Id.* at 627-28, 695 A.2d 264 (citations omitted).]

Further addressing the policy reasons for the distinction, the Court considered that:

Relevant to the distinction are "the relative bargaining power of the parties and the allocation of the loss to the better risk-bearer in a modern marketing system." Perfect parity is not required for a finding of substantially equal bargaining power. Although a manufacturer may be in a better position [***18] to absorb the risk of loss from physical injury or property damage, a purchaser may be better situated to absorb the "risk of economic loss caused by the purchase of a defective product"

[*Id.* at 628, 695 A.2d 264 (citations omitted).]

The Court also considered that the Legislature, in enacting the *U.C.C.*, had created warranty remedies for consumers dissatisfied with the quality of their purchases *Id.* at 629-30, 695 A.2d 264. The Court further [***338] noted the availability of remedies under the CFA. *Id.* at 640, 695 A.2d 264

The *Alloway* Court also gave significant consideration to the decision of the United States Supreme Court in *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986), rejecting a tort remedy where several supertanker vessels were disabled due to defective turbines. While *East River* was an admiralty case, the reasoning was persuasive to our Court, which discussed *East River* as follows:

After analyzing relevant state court decisions, including *Santor*, . . . the Court concluded "that a manufacturer in a commercial transaction has no duty under negligence or strict products-liability theory to prevent a product from injuring

itself." *Id.* at 871, 106 S. Ct. at 2302, 90 L. Ed. 2d 865. [***19] In an action for economic loss, the reasons for imposing a tort duty are weak while "those for leaving the party to its contractual remedies are strong." *Ibid.* For example, injury to a product itself neither implicates the safety concerns of tort law, *ibid.*, nor justifies [*300] "[t]he increased cost to the public that would result from holding the manufacturer liable in tort." *Id.* at 872, 106 S. Ct. at 2302, 90 L. Ed. 2d 865. Allowing recovery for all foreseeable damages in claims seeking purely economic loss, could subject a manufacturer to liability for vast sums arising from the expectations of parties downstream in the chain of distribution. *Id.* at 874, 106 S. Ct. at 2304, 90 L. Ed. 2d 865.

[*Alloway*, *supra*, 149 N.J. at 632-33, 695 A.2d 264.]

While *Alloway* did not specifically address the PLA, or the particular fact pattern involved here, where one component of a house has allegedly damaged other portions of the house, the Court noted that a number of other jurisdictions had held that tort law could not be invoked against the manufacturer of a component that harmed the product of which it was a part. *Id.* at 633-35, 695 A.2d 264. In dicta, the Court also cited with approval a series of cases holding that homeowners [***20] could not sue in tort or strict liability for defective workmanship:

Other jurisdictions also have rejected homeowners' reliance on tort law to recover economic loss arising out of construction defects. *See, e.g., Oceanside [v. Peachtree Doors]*, *supra*, 659 A.2d [267] at 270 [Maine 1995] (rejecting association's and individual homeowners' tort claims that sought recovery of economic loss caused by water damage around windows); *Morris v. Osmose Wood Preserving*, 99 Md. App. 646, 639 A.2d 147, 152 (1994) (rejecting homeowners' tort claims against plywood manufacturer for gradual deterioration of plywood in roofs because such damage constituted economic loss), *modified* 340 Md. 519, 667 A.2d 624 (1995); *Lempke v. Dagenais*, 130 N.H. 782, 547 A.2d 290,

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291 (1988) (rejecting property owners' tort claims for economic loss resulting from defective construction of garage); Waggoner [v. Town & Country Mobile Homes], supra, 808 P.2d [649] at 650, 653 [Okla.1990] (rejecting mobile home purchasers' tort actions against manufacturer for costs of repair and lost value resulting from defective roof design when damage was to only the mobile home itself, and holding that claim would be more properly made in warranty action). Cf. Aronsohn v. Mandara, 98 N.J. 92, 107, 484 A.2d 675 (1984) (declining "to decide the validity of plaintiff's negligence claim, [***21] since . . . the contractor's negligence would constitute a breach of the contractor's implied promise to construct the patio in a workmanlike manner").

[Id. at 638, 667 A.2d 624.]

[**339] *Alloway* did not "resolve the issue whether tort or contract law applies to a product that poses a risk of causing personal injuries or property damage but has caused only economic loss to the product itself." Id. at 639, 667 A.2d 624

Following *Alloway*, Goldson v. Carver Boat Corp., 309 N.J. Super. 384, 707 A.2d 193 (App.Div.1998), we addressed the [*301] issue of damage to property caused by a defect in a component. As did the Court, we adopted the rationale of East River, supra

In East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986), the United States Supreme Court held that, as a matter of federal admiralty law, damage solely to a defective product was not actionable in tort. Id. at 871, 106 S. Ct. at 2302, 90 L. Ed. 2d at 877. The Court considered but rejected decisions that adopted intermediate positions, which permitted tort recovery when a defective product poses a serious risk to other property or persons, but has caused only economic loss to the product itself. Id. at 868-70, 106 S. Ct. at 2301-02, 90 L. Ed. 2d at 875-76. [***22] The Court stated:

The intermediate positions, which essentially turn on the degree of risk,

are too indeterminate to enable manufacturers easily to structure their business behavior. . . . Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law.

[Goldson, supra, 309 N.J. Super. at 393-94, 707 A.2d 193 (quoting East River, supra, 476 U.S. at 870, 106 S. Ct. at 2301-02, 90 L. Ed. 2d at 876 (citations omitted)).]

Adopting this rationale, in *Goldson*, we affirmed the dismissal of product liability and negligence claims against the seller of a luxury yacht and against a company that installed the yacht's engine. We concluded:

Product liability grew out of a public policy judgment that people need more protection from dangerous products than may be afforded by the law of contracts and warranties. "The [***23] traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality." But other concerns exist where the buyer has "no real freedom of choice" and the manufacturer uses its "grossly disproportionate bargaining power" to introduce into the stream of commerce an instrumentality that, because of its defective design or construction, poses a "grave danger of injury" to other persons or property. Thus, the "paradigmatic products-liability action is one where a product 'reasonably certain to place life and limb in peril,' distributed without reinspection, causes bodily injury" or property damage to others. However, "if this development were

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allowed to progress too far, contract law would drown in a sea of tort."

Where, as here, there is no substantial disparity in bargaining power, and the only damage caused by the defective product is to the product itself, contract law, and the law of warranty in particular, is best suited to set the metes and bounds of appropriate remedies Tort principles are thus suited for resolving claims involving "unanticipated physical injury." [***24] On the other hand, a contractual duty arises from society's [**340] interest in the performance of promises. Contract principles are thus appropriate for determining "claims for consequential damage that the parties have, or could have, addressed in their agreement."

[Id. at 396-98, 707 A.2d 193 (citations omitted).]

[*302] In a subsequent case, closely on point here, we briefly addressed product liability, negligence, and strict liability claims concerning defective plywood used as a component in modernizing the roofs at a public housing complex. The plywood turned out to be insufficiently fire-proof to meet building code requirements, and as a result, all of the roofs had to be replaced by the complex's owner, the Newark Housing Authority (NHA). Zorba, supra, 362 N.J. Super. at 128, 827 A.2d 313. Citing Goldson and Allaway, we affirmed dismissal of NHA's claims against the plywood manufacturer as well as against the entity that applied fire retardant to the plywood and the manufacturer of the fire retardant. Id. at 142, 827 A.2d 313. See also King v. Hilton-Davis, 855 F.2d 1047, 1050-51 (3d Cir.1988), cert. denied, 488 U.S. 1030, 109 S. Ct. 839, 102 L. Ed. 2d 971 (1989).

In Easling v. Glen-Gery Corp., 804 F. Supp. 585, 590-91 (D.N.J. 1992), [***25] the court rejected an apartment complex purchaser's PLA claim for damage due to defective brick facing, reasoning that:

The question thus becomes what "product" the plaintiffs purchased for the purposes of resolving the instant motion. The plaintiffs purchased a completed apartment complex. They did not purchase a load of bricks from the defendant. The Third Circuit has held that in determining whether a product has

injured only itself in a products liability action in which a component part manufactured by a defendant causes injury to the product of which it is a part, the court must look not to the product manufactured by the defendant, but to the product purchased by the plaintiff. King v. Hilton-Davis, 855 F.2d 1047, 1051 (3d Cir.1988), cert. denied, 488 U.S. 1030, 109 S. Ct. 839, 102 L. Ed. 2d 971 (1989). Thus, even if the court assumes that plaintiff can prove that the allegedly leaking walls have led to damage to the studs or interiors of the building, the plaintiffs can not prove that the product that they purchased is anything other than the apartment complex itself, and the Products Liability Act thus fails to provide them with a basis for seeking tort relief.

[Id. at 590-91.]

We [***26] find the reasoning of Easling persuasive and consistent with Alloway, Goldson and East River. Plaintiffs here did not purchase the EIFS cladding; they bought a house. They cannot maintain a PLA claim by attempting to break the house down conceptually into its component parts and suing in strict-liability for defects in the components. As in Alloway, we acknowledge that the Legislature has created statutory remedies for consumers, [*303] in this case dissatisfied homeowners, by adopting the New Home Warranty and Builders' Registration Act, N.J.S.A. 46:3B-1 to -20, as well as the CFA. Moreover, as East River recognized, allowing a tort remedy here would subject component manufacturers to potentially unlimited liability. Under plaintiffs' theory, a buyer who purchased plaintiffs' house fifty years from now and discovered defects in the EIFS cladding could potentially sue the Sto defendants for water damage to the house.

DiIorio v. Structural Stone & Brick Co., 368 N.J. Super. 134, 845 A.2d 658 (App.Div.2004), on which plaintiffs rely, is distinguishable, because we approached the case [**341] as presenting an issue of builder malpractice rather than an issue of defective goods. Unlike the case before us, in DiIorio, [***27] the plaintiff contracted directly with a builder to construct a house for him. In the course of planning the construction, at the builder's suggestion DiIorio consulted with the builder's supplier, Structural Stone & Brick, concerning the type of stone facing plaintiff might want installed on the house. Based on that consultation, DiIorio authorized the builder to use stone facing supplied by Structural

405 N.J. Super. 288, *; 964 A.2d 330, **;
2009 N.J. Super. LEXIS 24, ***

Stone. When the stone eventually proved to be defective, causing damage to the house, DiIorio first sued the builder and later sued Structural Stone. The issue, as we framed it, was whether DiIorio's claims "for economic losses arising out of the deterioration of the stone facade . . . are governed by the four year statute of limitations of the Uniform Commercial Code . . . or by the six year statute of limitations applicable to tortious injury to real or personal property." *Id.* at 136, 845 A.2d 658 (citations omitted).

In concluding that the claims were governed by the six-year limitations period, we reasoned that "the transaction was primarily one for the professional services of a builder in which Structural Stone supplied stone incidental to the contract for the construction." *Id.* at 137, 845 A.2d 658. We also [***28] reasoned that the *U.C.C.* did not apply "to transactions in real property." *Id.* at 141, 845 A.2d 658. We concluded, at least for purposes of Structural Stone's summary judgment motion, that plaintiff was suing over a [*304] "transaction in real property or, alternatively, a transaction for the rendition of services, namely the construction of residential premises which incidentally included the provision of certain goods." *Id.* at 141, 845

A.2d 658. *DiIorio* is not on point, because plaintiffs here did not obtain the professional services of either the builder or the Sto defendants and could not sue any of those parties for professional negligence. ⁶

6 In *DiIorio*, we also concluded that plaintiff's CFA claim properly survived summary judgment. DiIorio consulted with the builder and stone supplier, who, according to his proofs, "knew the intended use" of the stone facing, and knew it was unfit for the intended use, "but nevertheless failed to disclose that knowledge to" the plaintiff. *Id.* at 142-43, 845 A.2d 658. DiIorio also claimed that Structural Stone misrepresented the seriousness of the defects in the stone when he brought problems to its attention. Unlike *DiIorio*, plaintiffs here did not receive or rely on any representations from [***29] the Sto defendants.

Consequently, we hold that plaintiffs cannot maintain a PLA claim against the Sto defendants for defects in the EIFS cladding itself or for water damage to the house allegedly caused by those defects.

Affirmed.

LEXSEE

**BRIAN MCLEAN and GAIL CLIFFORD, Plaintiffs, vs. COUNTRYWIDE HOME
LOANS, INC., and FIFTH THIRD MORTGAGE COMPANY, Defendants.**

Case No. 09-CV-11239

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
MICHIGAN, SOUTHERN DIVISION**

2009 U.S. Dist. LEXIS 76835

**August 27, 2009, Decided
August 27, 2009, Filed**

SUBSEQUENT HISTORY: Motion granted by, Claim dismissed by, Dismissed by [McLean v. Countrywide Home Loans, Inc., 2009 U.S. Dist. LEXIS 119428 \(E.D. Mich., Dec. 22, 2009\)](#)

COUNSEL: [*1] For Brian McLean, Gale Clifford, Plaintiffs: Kassem M. Dakhllallah, LEAD ATTORNEY, Landis & Day, PLC, Dearborn, MI.

For Countrywide Homes Loans, Incorporated, Defendant: Brian C. Summerfield, Bodman, Troy, MI; Michelle T. Thomas, Bodman, Detroit, MI.

JUDGES: HON. GEORGE CARAM STEEH, UNITED STATES DISTRICT JUDGE.

OPINION BY: GEORGE CARAM STEEH

OPINION

*ORDER GRANTING DEFENDANT COUNTRYWIDE'S
MOTION TO DISMISS (# 13) AND GRANTING
PLAINTIFFS LEAVE TO FILE AMENDED CLAIMS OF
FRAUDULENT AND NEGLIGENT
MISREPRESENTATION*

Defendant Countrywide Home Loans, Inc. moves to dismiss plaintiffs Brian McClean's and Gail Gifford's claims of an accounting, wrongful foreclosure, violations of the Truth in Lending Act ("TILA"), predatory lending, fraudulent misrepresentation, negligent misrepresentation, defamation of credit in violation of the Fair Credit Reporting Act ("FCRA"), rescission of notes and mortgages, reformation of notes and mortgages, violation of Michigan's Brokers, Lenders, and Servicers Licensing Act ("MBLSLA"), and usury. Oral argument would not significantly aid the decisional process. Pursuant to E.D. Mich. Local R. 7.1(e)(2), it is

ORDERED that the motion be resolved without oral argument. For the reasons set forth below, [*2] defendant Countrywide's motion to dismiss will be GRANTED. Plaintiffs will be GRANTED leave to file amended claims of fraudulent misrepresentation and negligent misrepresentation ONLY, to cure the failure to plead these claims with requisite specificity.

I. Background

Plaintiffs, husband and wife, filed their thirteen-count complaint in Michigan's Livingston County Circuit Court on February 17, 2009 alleging they purchased the real property commonly known as 5538 Arbor Bay Drive, Brighton, Michigan 48116 in 2006 for \$ 1,550,000.00, with a \$ 1,000,000.00 loan from Countrywide serving in the "senior" position, and a \$ 400,000.00 loan from defendant Fifth Third Bank serving in the "junior" position. Plaintiffs allegedly provided \$ 139,500.00 of their own funds towards the purchase price. Plaintiffs allege they could not afford the loan. Plaintiffs allege that the defendants fraudulently stated in a Uniform Loan Application that the plaintiffs made \$ 5,200.00 per month leasing out residential properties. Plaintiffs allege they were promised that the financing scheme used by the defendants was intended to be temporary, and that plaintiffs would be able to refinance or sell the property if [*3] they could not make the loan payments.

Plaintiffs continue by alleging that defendants and other mortgage lenders, brokers, and servicers systematically inflated the market values of real properties in order to lend more money and sell the mortgage loans on the mortgage-backed securities market. Defendants allegedly made an unknown number of mortgage loans to borrowers who were unable to repay the loans. Plaintiffs allege property values

plummeted when these loans were placed into default. Plaintiffs allege that, as a result, the value of their Brighton property suffered a precipitous decline, causing plaintiffs to owe more on their mortgage loans than the property is worth. Plaintiffs allege defendants Countrywide and Fifth Third Bank refused to modify the terms of their loans. Plaintiffs allege they are no longer able to make their mortgage payments, and cannot refinance the loans. Plaintiffs allege that they "have attempted for several months to resolve this matter . . . [.] [h]owever, Defendants have insisted that Plaintiffs must first default for two consecutive months before Defendants will do anything to modify the terms of the loans."

Defendant Countrywide removed the lawsuit [*4] to federal court on April 3, 2009 based on both diversity jurisdiction ¹, [28 U.S.C. § 1332](#), and federal question jurisdiction, [28 U.S.C. § 1331](#), over plaintiffs' federal TILA claims. Countrywide filed the instant motion to dismiss on May 13, 2009.

1 Plaintiffs are citizens of Michigan, while Countrywide is a citizen of New York, where it is incorporated, and California, where it has its principal place of business. Fifth Third Mortgage Company is allegedly a citizen of Ohio, where it is incorporated and has its principal place of business. See [28 U.S.C. § 1332\(a\)](#) and (c)(1). The amount in controversy exceeds \$ 75,000.00 exclusive of interest and costs. See [28 U.S.C. § 1332\(a\)](#).

II. Standard of Review

[Federal Rule of Civil Procedure 12\(b\)\(6\)](#) permits a district court to assess in a motion to dismiss whether the plaintiff has stated a claim upon which relief may be granted. In making that assessment, the court must construe the pleadings in a light most favorable to the plaintiff and determine whether the plaintiff's factual allegations present plausible claims. [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 564, 127 S. Ct. 1955, 1970, 167 L. Ed. 2d 929 (2007). The complaint's "[f]actual allegations must be enough [*5] to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." [Ass'n of Cleveland Fire Fighters v. City of Cleveland](#), 502 F.3d 545, 548 (6th Cir. 2007) (quoting [Bell Atlantic](#), 127 S. Ct. at 1965).

III. Analysis

A. Dismissal of Counts I, II, XII, and XIII

Plaintiffs do not dispute the representations in Countrywide's brief that plaintiffs stipulate to the

dismissal of Count I seeking an accounting, Count II alleging wrongful foreclosure, and Count XII alleging usury in violation of [M.C.L. §§ 438.31 et seq.](#) Plaintiffs also do not dispute that Count XIII alleging "TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION" does not allege a cause of action. See generally [Fed. R. Civ. P. 65](#) (providing for preliminary injunctions and temporary restraining orders on motion). Accordingly, Countrywide's motion to dismiss will be granted as to Counts I, II, XII, and XIII. [Twombly](#), 550 U.S. at 564; [Ass'n of Cleveland Fire Fighters](#), 502 F.3d at 548. The remaining claims are Counts III and V alleging violations of the TILA, Count IV alleging predatory lending, Count VI alleging fraudulent misrepresentation, Count VII alleging negligent misrepresentation, [*6] Count VIII alleging defamation of credit in violation of the FCRA, Count IX seeking rescission of notes and mortgages, Count X seeking reformation of notes and mortgages, and Count XI alleging violation of the MBLSLA.

B. Counts III and V - Violations of the TILA

Countrywide argues that the plaintiffs' TILA claims as alleged in Count III and V should be dismissed because: (1) [15 U.S.C. § 1639\(b\)\(3\)](#) does not apply to Countrywide; (2) the claims are time-barred by the one-year statute of limitations set forth in [15 U.S.C. § 1640\(e\)](#); and (3) plaintiffs are not entitled to rescission of their residential mortgage for a TILA violation, and to the extent the transaction was not a residential mortgage transaction, the three-year limitations period set forth in [15 U.S.C. § 1635\(f\)](#) has expired. Countrywide also argues that plaintiffs are not entitled to equitable tolling of the statute of limitations because plaintiffs have not alleged that Countrywide took affirmative steps to conceal plaintiffs' cause of action, nor alleged that plaintiffs could not have discovered the cause of action in time despite exercising due diligence.

Plaintiffs counter that the value of their Brighton property and market [*7] conditions were misrepresented to them by Countrywide, and that dismissal based on the expiration of the statute of limitations would be improper absent discovery. Plaintiffs assert that their TILA claims accrued only after plaintiffs realized what Countrywide was doing to property values. Plaintiffs assert that their transaction qualifies as a "high risk" loan under the Home Ownership and Equity Protection Act ("HOEPA"), and therefore Countrywide may be held liable under [15 U.S.C. § 1639\(h\)](#) for extending credit "without regard to the consumers' repayment ability, including the consumers' current and expected income, current obligations, and employment."

i.

In Count III, plaintiffs allege violations of [15 U.S.C. §§ 1639\(b\)\(3\)](#) and [1639\(h\)](#), and seek damages as well as rescission and reformation. [15 U.S.C. § 1639\(b\)\(3\)](#) provides:

(3) Modifications

The [Board of Governors of the Federal Reserve System] may, if it finds that such action is necessary to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of rights created under this subsection, to the extent and under the circumstances set forth in those regulations.

Plaintiffs' [*8] claim in Count III that Countrywide violated this enabling legislation fails to state a plausible claim as Countrywide owed no duty to the plaintiffs under [§ 1639\(b\)\(3\)](#). Countrywide is entitled to dismissal of this claim as a matter of law. *Twombly*, 550 U.S. at 564; *Ass'n of Cleveland Fire Fighters*, 502 F.3d at 548.

[15 U.S.C. § 1639\(h\)](#) provides:

(h) Prohibition on extending credit without regard to payment ability of consumer

A creditor shall not engage in a pattern or practice of extending credit to consumers under mortgages referred to in [section 1602\(aa\)](#) of this title, based on the consumers' repayment ability, including the consumers' current and expected income, current obligations, and employment.

(emphasis added). [15 U.S.C. § 1602\(aa\)](#) defines the "high interest" loans that qualify as "HOEPA loans" under the HOEPA amendments to the TILA ²:

(aa)(1) A mortgage referred to in this subsection means a consumer credit transaction that is secured by the consumer's principal dwelling, *other than a residential mortgage transaction*, a reverse mortgage transaction, or a transaction under an open credit plan, if --

* * *

(B) the total points and fees payable by the consumer at or before closing [*9] will exceed the greater of --

(i) 8 percent of the total loan amount; or

(ii) \$ 400.00.

(emphasis added). [15 U.S.C. § 1602\(w\)](#) defines a "residential mortgage transaction":

(w) The term "residential mortgage transaction" means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling *to finance the acquisition or initial construction of such dwelling*.

(emphasis added).

2 "HOEPA . . . was enacted as an amendment to TILA to provide increased protection to consumers entering into high risk loans ("HOEPA loans") as defined under [15 U.S.C. § 1602\(aa\)](#). For those borrowers whose mortgages qualify as HOEPA loans, the creditor has an obligation to not extend credit [in violation of [15 U.S.C. § 1639](#)]. Therefore, whether [the Defendant] owed a duty to the Plaintiff under [§ 1639\(h\)](#) turns on whether the loan was a HOEPA loan." *In re Vincent*, 381 B.R. 564, 570 (Bankr. D. Mass. 2008).

Plaintiffs have failed to allege a plausible claim that Countrywide violated [§ 1639\(h\)](#) because the plaintiffs' Countrywide mortgage does not qualify as a HOEPA [*10] loan, being a "residential mortgage transaction" used by the plaintiffs to finance the acquisition of plaintiffs' residential dwelling in Brighton. Plaintiffs allege they purchased the Brighton home in 2006 by financing a \$ 1,000,000.00 loan using Countrywide's "senior" mortgage. Plaintiffs do not dispute that the Brighton property is their residence, and that they used the Countrywide mortgage to purchase the home. Because the Countrywide mortgage was not a [§ 1602\(aa\)](#) HOEPA loan, Countrywide owed no duty to the plaintiffs under [§ 1639\(h\)](#). Plaintiffs argument that the points and fees they paid at closing met the standards of [§ 1602\(aa\)\(1\)\(B\)](#) is of no consequence because their

transaction was a "residential mortgage transaction" that does not qualify as a HOEPA mortgage. Countrywide is entitled to dismissal of the plaintiffs' [§ 1639\(h\)](#) claim as a matter of law. *Twombly*, 550 U.S. at 564; *Ass'n of Cleveland Fire Fighters*, 502 F.3d at 548. With the dismissal of plaintiffs' claims under [§ 1639\(b\)\(3\)](#) and [§ 1639\(h\)](#), Countrywide is entitled to dismissal of Count III in its entirety. *Id.*

ii.

In Count V, plaintiffs allege that Countrywide provided "false interest rate, fee and monthly payment [*11] disclosures in connection with the closing of the mortgage loan transaction," and "did not provide Plaintiffs with a Notice of Right to Cancel[.]" Plaintiffs do not identify the specific TILA provision or Regulation that was allegedly violated. Count V seeks damages, rescission and reformation.

To the extent plaintiffs rely on "Regulation Z," [12 C.F.R. §§ 226.31](#), [226.32](#), and [226.34](#), plaintiffs' Countrywide mortgage transaction was a "residential mortgage transaction" that is not governed by Regulation Z. The disclosure requirements of [12 C.F.R. § 226.32](#) do not apply to "[a] residential mortgage transaction." [12 C.F.R. § 226.32\(a\)\(2\)](#). See also [§ 226.31\(c\)\(1\)](#) (requiring a creditor to "furnish the disclosures required by [§ 226.32](#) at least three business days prior to consummation of a mortgage transaction covered by [§ 226.32](#)"); [§ 226.34\(a\)\(4\)](#) (prohibiting a mortgage creditor from extending "credit subject to [§ 226.32](#) . . . without regard to the consumers' repayment ability, including the consumers' current and expected income, current obligations, and employment." Plaintiffs cannot prevail on Count V under Regulation Z as a matter of law. *Twombly*, 550 U.S. at 564; *Ass'n of Cleveland Fire Fighters*, 502 F.3d at 548.

[15 U.S.C. § 1635\(a\)](#) [*12] does require a creditor to disclose a debtor's right to rescind a credit transaction involving the purchase of a principal dwelling within three business days of the transaction. [15 U.S.C. § 1638\(a\)](#) requires a creditor to disclose in a credit transaction other than "an open end credit plan" the amount financed and the finance charge expressed as an "annual percentage rate." Construed in a light most favorable to the plaintiffs, plaintiffs' Count V claims that Countrywide "did not provide Plaintiffs with a Notice of Right to Cancel[.]" and made "false interest rate, fee and monthly payment disclosures in connection with the closing of the mortgage loan transaction" state plausible claims under [§ 1635\(a\)](#) and [§ 1638\(a\)](#). *Twombly*, 550 U.S. at 564; *Ass'n of Cleveland Fire Fighters*, 502 F.3d at 548.

Turning to the issue of timeliness, [15 U.S.C. § 1640\(e\)](#) provides in pertinent part that "[a]ny action under

this section may be brought . . . within one year from the date of the occurrence of the violation." [Section 1640\(e\)](#) bars only a plaintiff's suit for damages under the TILA, and not an asserted cause of action for rescission under [15 U.S.C. § 1635](#). *McCoy v. Harriman Utility Bd.*, 790 F.2d 493, 496 (6th Cir. 1986). [*13] "Under [§ 1635](#), if the defined disclosures are made, the obligor has three days to rescind a credit transaction; if defined disclosures are not made, the obligor has a right to rescind up to three years after consummation of the transaction pursuant to [15 U.S.C. § 1635\(f\)](#)." *Id.*

"[T]he statute of limitations for actions brought under [15 U.S.C. § 1640\(e\)](#) is subject to equitable tolling in appropriate circumstances, and . . . for application of the doctrine of fraudulent concealment, the limitations period runs from the date on which the borrower discovers or had reasonable opportunity to discover the fraud involving the complained of TILA violation." *Jones v. TransOhio Savings Association*, 747 F.2d 1037, 1043 (6th Cir. 1984). To prevail on a claim of fraudulent concealment, the plaintiff must show that: (1) the defendant took affirmative steps to conceal the plaintiff's cause of action; and (2) the plaintiff could not have discovered the cause of action despite exercising due diligence." *Jarrett v. Kassel*, 972 F.2d 1415, 1423 (6th Cir. 1992).

Plaintiffs allege in their complaint that they "purchased the Property in 2006[.]" Attached to the complaint is a "Uniform Residential Loan Application" [*14] for "Amerifirst Mortgage Company" dated March 23, 2006. Attached to Countrywide's brief is a mortgage issued by Countrywide Home Loans, Inc. executed by plaintiffs Brian McLean and Gail Clifford on May 31, 2005. If a document is referred to in the pleadings and is central to the claim, the document as attached to a motion to dismiss is considered a part of the pleadings for purposes of a [Rule 12\(b\)\(6\)](#) motion to dismiss. *Armengau v. Cline*, 7 Fed. App'x 336, 343 (6th Cir. 2001). Construing the pleadings in a light most favorable to the plaintiffs, the subject mortgage transaction involving Countrywide occurred on May 31, 2005.

Plaintiffs filed this lawsuit on February 17, 2009, three years and eight-and-a-half months after the mortgage transaction. Plaintiffs allege in Count V:

60. Plaintiff [sic] did not discover and could not discover, Defendants' violations of the [TILA] because the documents provided to Plaintiff were withheld from Plaintiffs and if they existed at all, were seriously misleading.

To the extent plaintiffs allege that the disclosures required by [15 U.S.C. § 1635\(a\)](#) and [15 U.S.C. § 1638\(a\)](#) were "withheld," such restates the claim that Countrywide failed to make the disclosures [*15] required by [§ 1635\(a\)](#) and [§ 1638\(a\)](#). Plaintiffs' alternative allegation that the disclosure of their right to rescind within three days of the transaction was "seriously misleading" is conclusionary and implausible. [Twombly](#), 550 U.S. at 564; [Ass'n of Cleveland Fire Fighters](#), 502 F.3d at 548. Plaintiffs do not allege or explain in response to Countrywide's motion how the notice of the right to rescind within three days of the transaction was misleading. Plaintiffs' allegation that Countrywide provided "false interest rate, fee and monthly payment disclosures" that were "seriously misleading" fails to articulate why plaintiffs, as they were making their mortgage payments over three years, did not or could not discover by exercising due diligence that the disclosures were false. [Jarrett](#), 972 F.2d at 1423. Plaintiffs have not alleged a plausible claim of fraudulent concealment. *Id.*; [Twombly](#), 550 U.S. at 564; [Ass'n of Cleveland Fire Fighters](#), 502 F.3d at 548. Given the plaintiffs' own knowledge of the disclosures they received from Countrywide, discovery is not warranted.

Construing the pleadings and evidence in a light most favorable to the plaintiffs, plaintiffs have failed to allege a [*16] plausible claim of fraudulent concealment necessary to equitably toll the one-year statute of limitations in [15 U.S.C. § 1640\(e\)](#) governing the recovery of damages, or the three-year limitations period in [15 U.S.C. § 1635\(f\)](#) governing rescission. In that plaintiffs claims were filed on February 17, 2009, and the subject mortgage transaction was consummated more than three years earlier on May 31, 2005, Countrywide is entitled to dismissal of Count V as time-barred as a matter of law.

C. Count IV - Predatory Lending

Countrywide moves to dismiss the plaintiffs' claim of predatory lending arguing Michigan does not recognize such a claim. Plaintiffs rely on [In re First Alliance Mortgage Co.](#), 471 F.3d 977, 984 (9th Cir. 2006) and [Associates Home Equity Services, Inc. v. Troup](#), 343 N.J. Super. 254, 778 A.2d 529 (Super. Ct. 2001) for the proposition that, "[a]lthough there is no case in Michigan that has analyzed one way or another whether 'Predatory Lending' is a viable cause of action, based on the foregoing [discussion of [In re First Alliance](#) and [Associates Home Equity, supra](#)], it should be." *In re First Alliance* was decided under California tort law governing aiding and abetting fraud. [In re First Alliance](#), 471 F.3d at 983. [*17] *Associates Home Equity* was decided under New Jersey statutes known as the Consumer Fraud Act and the Law Against

Discrimination, as well as the federal Fair Housing Act and Civil Rights Act. [Associates Home Equity](#), 343 N.J. Super. at 262. These cases do not support a finding that Michigan recognizes an independent claim of "predatory lending." Sitting in diversity, this court is required to decide an issue of state law as would the highest court of the state. [Combs v. International Ins. Co.](#), 354 F.3d 568, 577 (6th Cir. 2004). Plaintiffs have failed to proffer authority to support a conclusion that the Michigan Supreme Court would recognize an independent tort claim of "predatory lending." Plaintiffs are entitled to dismissal of Count IV as a matter of law. [Twombly](#), 550 U.S. at 564; [Ass'n of Cleveland Fire Fighters](#), 502 F.3d at 548.

D. Counts VI and VII - Fraudulent and Negligent Misrepresentation

Countrywide moves to dismiss the plaintiffs' claims of fraudulent and negligent misrepresentation for failing to plead the claims with particularity as required by [Federal Rule of Civil Procedure 9\(b\)](#). Further, to survive a [Rule 12\(b\)\(6\)](#) motion to dismiss, the plaintiff's pleadings must provide [*18] "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." [Ass'n of Cleveland Fire Fighters](#), 502 F.3d at 548 (quoting [Bell Atlantic](#), 127 S. Ct. at 1964-65).

Count VI, fraudulent misrepresentation, alleges that "Defendant" provided "false property value and payment disclosures," that "Defendant" made "false material misrepresentations by representing that property values on the mortgage market were much greater than they actually were," and that "Defendants further knew or were reckless to the truth without knowledge that true property values were not reflective of the value of the loans being made[.]" Count VII, negligent misrepresentation, alleges that "Defendant prepared the information relating to the values of the Property, payment amounts on the Notes and Mortgages, whether Plaintiffs could refinance or sell the Property and closing costs without reasonable care as to their truth or falsehood."

To meet the particularity requirements of [Rule 9\(b\)](#), the plaintiff must "specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why [*19] the statements were fraudulent." [Frank v. Dana Corp.](#), 547 F.3d 564, 569-570 (6th Cir. 2008). Plaintiffs' allegations in Counts VI and VII fail to meet these requirements. At best, the allegations constitute recitations of the elements of fraudulent misrepresentation and negligent misrepresentation, and are thus insufficient to survive Countrywide's motion to dismiss. [Ass'n of Cleveland](#)

Fire Fighters, 502 F.3d at 548. Countrywide is entitled to dismissal of Counts VI and VII as matter of law. Twombly, 550 U.S. at 564; Ass'n of Cleveland Fire Fighters, 502 F.3d at 548.

E. Counts VII, IX, X, and XI

Countrywide moves to dismiss Count VII alleging violations of the FCRA, Counts IX and X alleging rescission and reformation, and Count XI alleging violations of the MBLSLA. Plaintiffs have not responded to Countrywide's motion to dismiss these claims. Count IX alleging violations of the FCRA fails to identify a particular provision of the FCRA that has been violated, and alleges only that "Defendants have or will make derogatory reports on Plaintiffs' credit reports that are patently untrue." Counts IX and X alleging, respectively, rescission and reformation of notes and mortgages are based [*20] on conclusionary allegations of unconscionability and fraud. Count XI alleging violations of M.C.L. § 445.1672 of the MBLSLA are also based on conclusionary allegations of fraud. Consistent with the court's ruling that plaintiffs have failed to allege an actionable claim of fraud, and the rule that more than mere labels and conclusions in a pleading are required to survive a motion to dismiss, Countrywide is entitled to dismissal of Counts VII, IX, X, and XI as a matter of law. Twombly, 550 U.S. at 564; Ass'n of Cleveland Fire Fighters, 502 F.3d at 548.

IV. Request to Amend Counts VI and VII

Plaintiffs argue in their closing sentence that "[i]n the event that the Court finds that fraudulent representation and negligent misrepresentation were not pled with the required specificity, Plaintiffs should be allowed to amend their Complaint to plead these causes

of action with greater specificity." Leave to amend is to be freely granted when justice so requires. Fed. R. Civ. P. 15(a)(2). The rule particularly applies where the complaint fails to plead fraud with the particularity required by Rule 9(b). Keweenaw Bay Indian Cmty. v. State of Michigan, 11 F.3d 1341, 1348 (6th Cir. 1993). Plaintiffs [*21] will be granted leave to file amended claims of fraudulent and negligent misrepresentation as alleged in Counts VI and VII, to plead these claims with greater specificity.

V. Conclusion

Defendant Countrywide's motion to dismiss is hereby GRANTED. Plaintiffs Brian McClean's and Gail Gifford's claims as alleged in the February 17, 2009 Complaint are hereby DISMISSED in their entirety. Plaintiffs are hereby GRANTED leave to file amended claims of fraudulent misrepresentation and negligent misrepresentation ONLY, to cure the Rule 9(b) defects in Counts VI and VII as alleged in the February 17, 2009 Complaint. Plaintiffs shall file their amended Counts VI and VII on or before September 18, 2009. Failure to timely file the amended claims of fraudulent misrepresentation and negligent misrepresentation will result in the dismissal of these claims as futile, and dismissal of Countrywide from this lawsuit.

SO ORDERED.

Dated: August 27, 2009

/s/ George Caram Steeh

GEORGE CARAM STEEH

UNITED STATES DISTRICT JUDGE

LEXSEE

**McNar Industries, Inc., Appellant, v. Feibes & Schmitt, Architects, et al.,
Respondents.**

79430

**SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD
DEPARTMENT**

245 A.D.2d 993; 667 N.Y.S.2d 88; 1997 N.Y. App. Div. LEXIS 13724

**December 31, 1997, Decided
December 31, 1997, Entered**

PRIOR HISTORY: [***1] Appeals from two orders of the Supreme Court (Lynch, J.), entered October 28, 1996 and November 1, 1996 in Schenectady County, which granted defendants' motions for summary judgment dismissing the complaint.

DISPOSITION: The orders are affirmed, without costs.

COUNSEL: Lynch & Lynch (Michael C. Lynch of counsel), Albany, for appellant.

Donohue, Sabo, Varley & Armstrong P.C. (Joshua A. Sabo of counsel), Albany, for Feibes & Schmitt, Architects, respondent.

Pemberton & Briggs (James L. Pemberton of counsel), Schenectady, for David Sadowsky, respondent.

JUDGES: Cardona, P. J., Crew III, White and Yesawich Jr., JJ., concur.

OPINION BY: Carpinello

OPINION

[*993] [*89] Carpinello, J.

In connection with a roof replacement project in the City of Schenectady, Schenectady County, the Schenectady Municipal Housing Authority hired plaintiff as its general contractor, defendant Feibes & Schmitt, Architects to provide architectural services and defendant David Sadowsky to oversee the project. Neither defendant entered into a contractual relationship with plaintiff concerning the project. Following this Court's affirmance of the dismissal of plaintiff's third-

party action against defendants in [***2] a prior case (see, Tempforce, Inc. v Municipal [*994] Hous. Auth., 222 AD2d 778, *lv denied* 87 NY2d 811), plaintiff commenced this action alleging negligence, breach of contract and breach of warranty. At issue on this appeal is the propriety of Supreme Court's orders dismissing the negligence causes of action. *

* Plaintiff has failed to address in its brief the dismissal of the remaining causes of action; thus, its appeal from their dismissals is deemed abandoned (see, Horth v Mansur, 243 AD2d 1041).

In order for a party to recover on a cause of action for negligent misrepresentation, "there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity" (Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood, 80 NY2d 377, 382; see, Ossining Union Free School Dist. v Anderson LaRocca Anderson, 73 NY2d 417, 424). Since plaintiff was not in direct privity with either defendant, we must [***3] determine whether the relationship between them was sufficiently close as to constitute the functional equivalent of privity (see, *id.*).

The crux of plaintiff's privity argument is that it relied on defendants' proper performance of their respective duties in connection with the project. According to plaintiff, defendants unreasonably withheld approval of certain materials, refused to allow use of the project site for staging purposes, withheld approval of necessary changes and failed to coordinate and/or correct design and material defects, and that it was damaged as a result of defendants' "negligent performance" of these respective project duties. In our view, these allegations fall short of establishing a relationship so close as to

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approach contractual privity because any architectural or supervisory services performed by defendants were not performed for plaintiff's benefit (*cf.*, [Ossining Union Free School Dist. v Anderson LaRocca Anderson, supra](#)); accordingly, the negligence causes of action were properly dismissed (*cf.*, [Freedman & Son v A. I. Credit](#)

[Corp., 226 AD2d 1002, 1003](#); [Solondz v Barash, 225 AD2d 996, 998-999](#)).

Cardona, P. J., Crew III, White [***4] and Yesawich Jr., JJ., concur.

Ordered that the orders are affirmed, without costs.

LEXSEE

NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY AND BANQUE
NATIONALE DE PARIS, HOUSTON AGENCY, PLAINTIFFS-RESPONDENTS,
v. PAVONIA RESTAURANT, INC., ERNESTO A. TOLENTINO, JAMES A.
MCLAUGHLIN, JR., PAUL S. FREEMAN, MANMOHAN PATEL, WILLIAM H.
CONSTAD, DONALD CINOTTI, VINCAS M. VYZAS, K. JOSEPH VYZAS,
SAMUEL A. DIFEO, JOSEPH C. DIFEO, ELEANOR HARTNETT AND H. CLAY
IRVING, III, DEFENDANTS, AND RAY VYZAS, FRANCIS E. SCHILLER,
EUGENE P. SQUEO, JOHN SEAHOLTZ AND LEONA SEAHOLTZ,
DEFENDANTS-APPELLANTS. NEW JERSEY ECONOMIC DEVELOPMENT
AUTHORITY AND BANQUE NATIONALE DE PARIS, HOUSTON AGENCY,
PLAINTIFFS-RESPONDENTS, v. PAVONIA RESTAURANT, INC., RAY VYZAS,
FRANCIS E. SCHILLER, K. JOSEPH VYZAS, EUGENE P. SQUEO, SAMUEL A.
DIFEO, JOSEPH C. DIFEO, ELEANOR HARTNETT, JOHN SEAHOLTZ,
LEONA SEAHOLTZ AND H. CLAY IRVING, III, JAMES A. MCLAUGHLIN,
JR., PAUL S. FREEMAN, MANMOHAN PATEL, WILLIAM H. CONSTAD,
DONALD CINOTTI AND VINCAS M. VYZAS, DEFENDANTS, AND ERNESTO
A. TOLENTINO, DEFENDANT/APPELLANT.

A-4568-96T3, A-5837-96T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

319 N.J. Super. 435; 725 A.2d 1133; 1998 N.J. Super. LEXIS 539

September 29, 1998, Submitted
December 4, 1998, Decided

SUBSEQUENT HISTORY: [***1] Approved for
Publication March 5, 1999.

PRIOR HISTORY: On appeal from Superior Court of
New Jersey, Law Division, Essex County.

COUNSEL: *Schiller & Sasso*, for appellants Ray Vyzas,
Francis E. Schiller, Eugene P. Squeo, John Seaholtz and
Leona Seaholtz on A-4568-96T3 (*Theodore E. Schiller*,
on the brief).

Margulies, Wind, Herrington & Knopf, for appellant
Ernesto A. Tolentino on A-5837-96T3 (no brief was
submitted on behalf of this appellant).

Dilworth, Paxson, Kalish & Kaufman, for respondents
(*Francis P. Maneri*, on the brief).

JUDGES: Before Judges MUIR, Jr., KEEFE and
EICHEN. The opinion of the court was delivered by
EICHEN, J.A.D.

OPINION BY: EICHEN

OPINION

[**1135] [*438] The opinion of the court was
delivered by

[*439] EICHEN, J.A.D.

In these consolidated appeals, defendants Ray
Vyzas, Francis E. Schiller, Eugene P. Squeo, John
Seaholtz and Leona Seaholtz, and Ernesto A. Tolentino
(defendants), appeal from an order entered on February
6, 1997 granting summary judgment in favor of plaintiffs
New Jersey Economic Development Authority (the
EDA) and Banque Nationale de Paris (the Bank) in the
sum of \$ 1,530,392.88, and a subsequent order entered
on March 21, 1997 [***2] denying their motion for
reconsideration. We affirm.

The litigation arose out of the non-payment of a \$
1,470,000 loan (the loan) by the EDA and the Bank to
Pavonia Restaurant, Inc. (Pavonia). Pavonia was
established to open and operate a new restaurant to be
located in a newly-constructed eight-story office building
in downtown Jersey City. The proceeds of the loan were
used to start the restaurant which was known as

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"Hudson's." Repayment of the loan was individually guaranteed by defendants,¹ who are mostly professional and local business people and, with one exception, are also stockholders in Pavonia.

1 For convenience and ease of reference, we use the term "defendants" to refer interchangeably to all of the individual guarantors and the defendants-appellants even though not all of the guarantors have participated in this appeal.

Although a notice of appeal was filed on behalf of K. Joseph Vyzas, Samuel E. Difeo, Joseph C. Difeo, Eleanor Hartnett, and H. Clay Irving, III, these guarantors did not file a brief. Consequently, we consider the appeal dismissed as to them.

Defendant Ernesto A. Tolentino filed a separate notice of appeal and a separate appendix, and he apparently has joined in defendants-appellants' brief. Accordingly, his appeal is considered perfected.

The guarantors James A. McLaughlin, Jr., Paul S. Freeman, Manmohan Patel, William H. Constad, Donald Cinotti, and Vincas M. Vyzas, did not file a notice of appeal.

***3] After Pavonia and defendants defaulted in their obligations to repay the loan, plaintiffs commenced this action. Judge Thomas Brown granted summary judgment in favor of plaintiffs on their complaint, concluding there were no genuine issues of material fact on the enforceability of the guarantees. The judge also [*440] denied defendants' motion to file an amended responsive pleading. Thereafter, the judge denied defendants' motion for reconsideration, and this appeal ensued.

Because this is an appeal from the grant of summary judgment, we are required to accept defendants' evidence as true and to give them the benefit of all favorable inferences that can reasonably be drawn therefrom. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 535-36, 666 A.2d 146 (1995); see also *R. 4:46-2(c)*. Accordingly, we will summarize the pertinent facts of the case in accordance with those principles.

To acquire the funds necessary to make the loan, the EDA issued and sold Economic Growth Bonds, Composite Issue (1992 Series [**1136] P Bonds) to investors. In order to encourage investment in the bonds, at the request of Pavonia and defendants, the Bank issued an irrevocable letter of credit pursuant [***4] to which it agreed to repay the bondholders in the event Pavonia defaulted.

On June 1, 1992, Pavonia executed a loan agreement, a promissory note, financing statements, and a security agreement pledging its leasehold improvements and restaurant equipment as security for repayment of the loan (the loan documents). On the same date, defendants executed a Personal Guaranty Agreement whereby they each agreed individually to guarantee repayment of the loan to Plaintiffs in the event of a default by Pavonia (the guarantees).

Due to a four-month delay in the opening of the restaurant, insufficient advertising, a high-priced menu, staffing problems, and the shareholders' failure to make the necessary capital contributions, Pavonia ran into financial difficulty and the loan went into default. Consequently, as of August 19, 1994, the arrearages due from Pavonia to the EDA equalled \$ 241,207.71, and plaintiffs sought payment from defendants in accordance with their guarantees.

Thereafter, Pavonia and defendants requested plaintiffs to forbear enforcement of their rights under the loan agreement and [*441] guarantees. Plaintiffs agreed and, on October 17, 1994, the parties entered into a "Loan Forbearance [***5] Agreement." The agreement essentially provided that plaintiffs would not accelerate the loan balance for a period of time if defendants paid the delinquent amounts due and advanced monthly payments through December 1, 1994 totalling \$ 312,970.19. In the agreement, defendants acknowledged that Pavonia had defaulted on the loan, that they had not cured the default, and that they had no defenses to plaintiffs' claims under the loan documents or individual guarantees.²

2 The forbearance agreement also states:

[Defendants] have no set-offs, defenses or counterclaims against [plaintiffs] with respect to the Indebtedness, and . . . are indebted to the Secured Parties for the amounts recited in this Agreement.

On February 1, 1995, Pavonia again defaulted, and plaintiffs accelerated the loan balance. In a letter dated June 22, 1995, counsel for plaintiffs made a demand upon defendants for full payment of the loan or possession of the assets Pavonia had pledged as collateral. When defendants failed [***6] to respond, on July 2, 1995, plaintiffs filed a complaint in replevin against Pavonia and defendants, seeking possession of the pledged assets and judgment in the amount of the loan balance, interest, counsel fees and costs. Plaintiffs also sought compensatory and punitive damages for

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conversion, wrongful detainer, and breach of contract. Defendants filed an answer, defenses, and a counterclaim, essentially asserting, among other defenses, that both plaintiffs and defendants were suffering under a mutual mistake of fact when the loan was granted because both parties "erroneously assumed that the business of Pavonia . . . was capable of generating sufficient net revenue to enable defendant Pavonia" to repay the loan.

After extensive discovery, on December 18, 1996, plaintiffs moved for summary judgment. Defendants opposed the motion and cross-moved to amend their responsive pleadings to assert defenses grounded in fraud, bad faith, and allegations that plaintiffs had failed to disclose material facts at the inception of the loan that materially increased their risk under the guarantees [*442] rendering them unenforceable. Specifically, defendants alleged that from the inception of the loan, [***7] plaintiffs knew and failed to disclose (1) that Pavonia's assets were insufficient to secure the loan and (2) that plaintiffs were relying principally, if not exclusively, upon defendants' guarantees as the source of repayment of the loan.

Defendants supported their cross-motion with various deposition transcripts and documents, including two "memoranda" which they maintained demonstrated that plaintiffs had relied solely on the creditworthiness of defendants, whose collective net worth was in excess of \$ 56 million dollars, to secure repayment of the loan. One memorandum was prepared on March 12, 1992 by Steven K. Szmuto, the senior loan officer of the EDA, and the other was a loan review document [**1137] prepared on March 26, 1992 by Michael McKee, then vice-president of the Bank. The Szmuto memorandum dealt with the collateral for the loan. It indicated that plaintiffs needed more than the leasehold improvements and restaurant equipment as collateral, mentioning that the guarantors had a substantial net worth to secure the loan.

At his deposition, Szmuto explained the memorandum, indicating that the EDA used three factors to evaluate the loan: (1) the sufficiency of the anticipated [***8] cash flow from the restaurant business; (2) the quality of the proposed management; and (3) the sufficiency of the collateral pledged. He explained that "where[] one part or one component of the loan evaluation process [is] weak, . . . [the EDA] seek[s] to mitigate that weakness by having . . . additional personal guarantees or whatever . . . additional collateral we can to strengthen it independent of the collateral." Szmuto stated that because the leasehold improvements and the restaurant equipment were not sufficient collateral to repay the loan in the event the restaurant failed, the creditworthiness of the guarantors was considered "the

main source of repayment." However, he also stated that in evaluating the loan, he viewed the anticipated cash flow from the business as a significant source of repayment, noting the extensive business experience of Pavonia's [*443] president, defendant Ray Vyzas, and the restaurant's general manager who had previously directed operations of four different restaurants. Szmuto also testified that he had analyzed the financial statements prepared by Pavonia's accountant and that he relied upon the location and anticipated upscale clientele of the restaurant [***9] to generate a steady flow of income. Szmuto stated:

I had asked for financial statements prepared by an independent accounting group which was provided, Sobel & Company, which were projections of balance sheet income statements, probably the cash flow statement as well as the assumptions which we use to prepare the projections and assumption ranging from the revenue, what the average price and rates would be, whether that's consistent with other restaurants in Jersey City. We looked at it in terms of the value of the cash flow, the location of the restaurant which was near Journal Square which was in a building that was almost completely occupied and also in close proximity to other offices that would attract the type of clientele to this style of restaurant that they were proposing. We relied on the Sobel projections during the course of the evaluation process. I consulted with our director of finance, [Eugene Bukowski], and ultimately the project was presented to our board where we determined that the projections that were submitted by the applicant were reasonable.

The loan review document that McKee prepared contains his evaluation and analysis of the loan. The document [***10] indicates that the primary source of repayment of the loan would be Pavonia's cash flow from operation of the restaurant and that the secondary source would be the guarantors. In an affidavit, McKee explained exactly how he evaluated the loan. He stated that he had used projections prepared by Pavonia's accountant and that based on these projections, which he noted seemed reasonable, he believed that the restaurant could generate sufficient cash flow to repay its debts. In the affidavit, McKee clarified a comment he had made in the loan review document that "no value" was assigned

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to the cash flow generating ability of Pavonia or its collateral, explaining that "it was a start-up restaurant with no operational history, and therefore a value simply could not be placed on the [restaurant's] ability to generate cash flow."

Lloyd G. Cox, vice-president of the Bank, also testified at depositions and explained the criteria the Bank used in evaluating the loan:

[*444] We looked at this loan and I made the final decision to include it into the composite [bond issue]. We looked at this loan from the standpoint that it was a start-up restaurant, projections were provided that showed that [***11] the restaurant could have ample cash flow to repay the indebtedness. You had a large number of guarantors willing to guarantee the loan. These were professional, successful businessmen and women, I guess, attorneys, doctors, who lived and worked in this area so we placed [***1138] reliance that they understood their market, they understood their home town, if you will, and that carried a lot of weight. We would not have entered into a relationship knowing that there was no chance that the restaurant would have made it and we would have had to collect against the guarantors.

Cox went on to state that, after analyzing the financial statements of the individual guarantors, he was satisfied Pavonia had the ability to repay the loan in the event of a default. With respect to the high-risk nature of the restaurant business, Cox stated the following:

I wouldn't have included it if I didn't think it had much of a chance of making it. I was relying on the New Jersey EDA having approved the loan and also relying on this group of professionals, successful business people who were willing to guarantee this loan and this venture, that they wouldn't have done so if they didn't think it had [***12] a likelihood of being successful.

Eugene Bukowski, the managing director of finance for the EDA agreed, testifying in his deposition that the financial projections prepared by Pavonia's accountant were conservative when compared with industry standards and, that according to the financial projections,

it appeared that Pavonia's expected cash flow would be sufficient to repay the loan.

In granting summary judgment to plaintiffs and denying their motion for reconsideration, Judge Brown concluded that defendants had failed to support with sufficient evidential materials any of the theories they had advanced as defenses to the enforceability of the individual guarantees. In so doing, the judge observed that a party is not required to disclose information to another unless a fiduciary relationship exists. He also determined that plaintiffs were "not responsible to advise [defendants] of information that [was] readily available to them on their own." The judge found that "entering into a new restaurant arrangement [is] a high risk business, . . . [and] that defendants knew what they were getting into" at the inception of the loan and also when they executed the forbearance agreement. [***13] The judge then denied defendants' cross-motion [*445] to amend their pleadings to allege fraud, breach of good faith, and failure to disclose a material risk, concluding the contentions were "moot based on the Court's decision on the [summary judgment] motion." The judge further stated that:

any of the asserted modifications to the pleadings at this late date are merely an effort to manufacture what might be a defense to hold up the proceeding until such time as there can be further motions made to strike them. I see nothing in any--any of the papers that were submitted to this court that would legitimately indicate that there was any fraud, breach of good faith, or failure to disclose on the part of the plaintiffs.

In denying defendants' motion for reconsideration, the judge added:

[T]here does not appear to be anything in the case that in any way suggests any fraud or bad faith on the part of any person in the bank. The fact that this was a restaurant, an operation which success is generally known to be questionable, also the fact, as I indicated, that the investors . . . are all businessmen . . . they're not 87 year old widows who are living on what they inherited and want [***14] to invest the money. . . . [T]hese are businessmen who were fully aware of what the obligations were, not only when they entered into the surety agreement, but also

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when they entered into the forbearance agreement.

On appeal, although defendants raise arguments under numerous separate point headings, the arguments are essentially twofold: (1) that the evidence presented raised genuine issues of material fact from which inferences could be drawn of plaintiffs' bad faith, fraud, and breach of duty to disclose; and (2) that the judge abused his discretion in denying their motion to amend their responsive pleadings under [R. 4:9-1](#).

I.

"Every fraud in its most general and fundamental conception consists of the obtaining of an undue advantage by means of some act or omission that is unconscientious [**1139] or a violation of good faith." [Jewish Ctr. of Sussex County v. Whale](#), 86 N.J. 619, 624, 432 A.2d 521 (1981). A plaintiff must establish a claim of fraud by clear and convincing evidence. [Baldasarre v. Butler](#), 254 N.J. Super. 502, 521, 604 A.2d 112 (App.Div.1992), *rev'd in part on other grounds*, 132 N.J. 278, 625 A.2d 458 (1993). Legal fraud consists of five elements: (1) a material [***15] representation by the [**446] defendant of a presently existing or past fact; (2) knowledge or belief by the defendant of that representation's falsity; (3) an intent that the plaintiff rely thereon; (4) reasonable reliance by the plaintiff on the representation; and (5) resulting damage to the plaintiff. [Id.](#) at 520, 604 A.2d 112. Equitable fraud, unlike legal fraud, does not require knowledge of the falsity and an intent to obtain an undue advantage. [Id.](#) at 521, 604 A.2d 112.

Deliberate suppression of a material fact that should be disclosed is equivalent to a material misrepresentation (*i.e.*, an affirmative false statement). [Strawn v. Canuso](#), 140 N.J. 43, 62, 657 A.2d 420 (1995). In other words, "[s]ilence, in the face of a duty to disclose, may be a fraudulent concealment." [Berman v. Gurwicz](#), 189 N.J. Super. 89, 93, 458 A.2d 1311 (Ch.Div.1981) (emphasis and citation omitted), *aff'd*, 189 N.J. Super. 49, 458 A.2d 1289 (App.Div.), *certif. denied*, 94 N.J. 549, 468 A.2d 197 (1983). However, the concealed facts "must be facts which if known . . . would have prevented [the obligor] from obligating himself, or which materially increase his responsibility." [Ramapo Bank v. Bechtel](#), 224 N.J. Super. 191, 198, [***16] 539 A.2d 1276 (App.Div.1988) (internal punctuation and citation omitted). Nonetheless, a party has no duty to disclose information to another party in a business transaction unless a fiduciary relationship exists between them, unless the transaction itself is fiduciary in nature, or unless one party "expressly reposes a trust and confidence in the other."

[Berman, supra](#), 189 N.J. Super. at 93-94, 458 A.2d 1311. Indeed, as a general proposition, creditor-debtor relationships rarely give rise to a fiduciary duty "inasmuch as their respective positions are essentially adversarial." [Globe Motor Car Co. v. First Fidelity Bank](#), 273 N.J. Super. 388, 393, 641 A.2d 1136 (Law Div.1993), *aff'd*, 291 N.J. Super. 428, 677 A.2d 794 (App.Div.), *certif. denied*, 147 N.J. 263, 686 A.2d 764 (1996). Further, where information is equally available to both parties, neither party has a duty to disclose that information to the other. [Id.](#) at 395, 641 A.2d 1136.

We have carefully reviewed the entire record, the arguments and factual contentions presented, and prevailing legal principles [**447] and conclude that the motion judge properly determined that the evidence presented by defendants does [***17] not create a "genuine issue of material fact" under [R. 4:46-2](#) requiring submission of their claims of fraud or bad faith to a jury. "[T]he evidence 'is so one-sided that [plaintiffs] must prevail as a matter of law.'" [Brill, supra](#), 142 N.J. at 540, 666 A.2d 146 (quoting [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)).

Defendants claim that plaintiffs placed sole reliance on their individual guarantees for repayment of the loan. As reflected in the factual recitations previously given, the record does not support that assertion. Rather, it reflects that both plaintiffs and defendants anticipated that the revenues from the restaurant would support repayment of the loan. The information concerning the anticipated revenues was, in fact, derived from Pavonia's accountant, Sobel & Company. Although defendants maintain that the McKee loan review document concluded that "no reliance could be placed on the 'collateral or cash flow generating ability of the restaurant,'" the record clearly belies this assertion. The record discloses that McKee believed, based on the projections made by Pavonia's accountant, that the restaurant [***18] would generate sufficient cash flow to repay the loan. As Lloyd Cox, vice-president of the Bank, indicated, the Bank never would have included the loan to Pavonia in the composite bond issue if it did not believe that Pavonia would be successful. Despite defendants' attempts to make it appear as though plaintiffs knew Pavonia would be unable to repay the loan and therefore insisted on the guarantees, nothing in the record supports this proposition. Defendants have not pointed to any [**1140] evidence that even suggests plaintiffs had information about Pavonia's ability to repay the loan which defendants did not have. Indeed, everyone understood that opening a restaurant in a new location was an inherently risky business. Plaintiffs hoped that the restaurant's success would comport with the financial projections of Pavonia's accountant just as

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defendants did. The obvious fact is that external factors [*448] impeded Pavonia's success, factors which were completely unrelated to plaintiffs' evaluation of the loan agreements.³

3 We note that although Pavonia was unsuccessful in establishing a viable restaurant business, its successor, Laico's of Journal Square, has not been.

***19] In sum, defendants have utterly failed to demonstrate what facts plaintiffs had, but defendants lacked, that materially increased the risk beyond that which plaintiffs knew defendants intended to assume.

Impliedly recognizing that they could not prove their case under these theories, defendants argue that their claims are viable under the principles of law contained in the *Restatement of Security: Suretyship* § 124 (1941) (the *Restatement*).⁴ That section provides in relevant part:

Where before [a] surety has undertaken his obligation the creditor knows facts unknown to the surety that materially increase the risk beyond that which the creditor has reason to believe the surety intends to assume, and the creditor also has reason to believe that these facts are unknown to the surety and has a reasonable opportunity to communicate them to the surety, failure of the creditor to notify the surety of such facts is a defense to the surety.

4 Section 124 of the *Restatement* was revised in 1996. See *Restatement (Third) of Suretyship and Guaranty* § 12 (1996). However, there were no substantive changes to the section that affect this decision.

***20] Defendants argue that plaintiffs violated these principles of law by failing to disclose facts to them that materially increased their risk under the guarantees, specifically, that unbeknownst to defendants, plaintiffs were relying on their guarantees as the primary security for repayment of the loan and failed to disclose this fact to them. They maintain they would not have undertaken the risk if they had known the guarantees were the principal security for the loan.

New Jersey typically gives considerable weight to *Restatement* views, and has on occasion even adopted those views as the law of this state. *Citibank, N.A. v.*

Estate of Simpson, 290 N.J. Super. 519, 530, 676 A.2d 172 (App.Div.1996). Although we find it [*449] unnecessary to formally adopt the *Restatement* here, we have employed its principles, in part, to evaluate defendants' claims.

Section 124 prescribes three conditions precedent to imposing a duty on a creditor to disclose facts it knows about the debtor to the surety: (1) the creditor must have reason to believe that those facts materially increase the risk beyond that which the surety intends to assume; (2) the creditor must have reason to believe that [***21] the facts are unknown to the surety; and (3) the creditor must have a reasonable opportunity to notify the surety of such facts. See, e.g., *Sumitomo Bank of Cal. v. Iwasaki*, 70 Cal. 2d 81, 73 Cal. Rptr. 564, 447 P.2d 956, 963 (1968).

However, the comments to Section 124 of the *Restatement* explain that:

[this rule] does not place any burden on the creditor to investigate for the surety's benefit. It does not require the creditor to take any unusual steps to assure himself that the surety is acquainted with facts which he may assume are known to both of them.

Every surety by the nature of his obligation undertakes risks which are the inevitable concomitants of the transactions involved. Circumstances of the transactions vary the risks which will be regarded as normal and contemplated by the surety.

[*Restatement of Security: Suretyship* § 124 cmt. b (1941).]

For the reasons previously stated in our rejection of defendants' claims of fraud and bad faith, we are satisfied that defendants failed to raise any factual issue applying the principles derived from the *Restatement*. [*1141] Suffice it so say, plaintiffs were not in possession [***22] of any facts that defendants were not aware of; both parties hoped the restaurant would generate sufficient cash flow to repay the loan. Regrettably, it did not.

Defendants' reliance on out-of-state cases are equally unavailing. All of the cases involve facts that are clearly distinguishable from those in the instant case. See *Morris v. Columbia Nat'l Bank of Chicago*, 79 B.R. 777, 785-86 (N.D.Ill 1987) (observing that creditor may have acted in bad faith in allowing debtor to engage in a

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transaction favorable to the creditor but adverse to [*450] the surety, when creditor knew debtor was having financial problems); Camp v. First Fin. Fed. Sav. & Loan Ass'n, 299 Ark. 455, 772 S.W.2d 602, 604-05 (1989) (holding that failure to disclose to surety that interest on loan to debtor was delinquent and that lender was making secret side loans to debtor discharged liability of surety); Georgia Pacific Corp. v. Levitz, 149 Ariz. 120, 716 P.2d 1057, 1059 (1986) (holding that guarantor was discharged from liability on a continuing guarantee where creditor knew guarantor was unaware of debtor's insolvency but continued to extend credit to debtor, thereby materially [***23] increasing the guarantor's risk beyond that which guarantor intended to assume); Sumitomo Bank of Cal. v. Iwasaki, *supra*, 73 Cal.Rptr. 564, 447 P.2d at 966-67 (holding same); McHenry State Bank v. Y & A Trucking, Inc., 117 Ill. App. 3d 629, 454 N.E.2d 345, 349, 73 Ill. Dec. 485 (1983) (concluding that a creditor's release of collateral without the consent of the guarantor will discharge the guarantor of his obligations); Maine Nat'l Bank v. Fontaine, 456 A.2d 1273, 1275-76 (Me.1983) (reversing jury verdict on judge's erroneous refusal to charge jury that creditor had duty to disclose to an accommodation party that it had terminated efforts on behalf of debtor to obtain a Small Business Association loan, and holding that jury could have determined that circumstance materially increased risk beyond that which accommodation party had agreed to take); Security Bank, N.A. v. Mudd, 215 Mont. 242, 696 P.2d 458, 460-61 (1985) (holding that creditor's failure to disclose its decision not to apply collateral to reduce debtor's loan discharged guarantor); see also Ramapo Bank v. Bechtel, *supra*, 224 N.J. Super. at 199, 539 A.2d 1276 (reversing summary judgment and remanding [***24] to trial court to consider whether concealed pre-loan side agreement by bank not to pursue a co-guarantor in event debtor defaulted in repaying loan constitutes fraud).

Finally, aside from the merits of the instant case, there is an additional reason why summary judgment was properly granted. The record clearly reflects that defendants waived their claims and defenses relating to the loan when they entered into [*451] the forbearance agreement. See Cedar Ridge Trailer Sales, Inc. v. National Community Bank, 312 N.J. Super. 51, 62-65, 711 A.2d 338 (App.Div.1998). Their assertion that the waiver is unenforceable because they lacked knowledge of plaintiff's alleged "fraud" until they conducted discovery is unavailing in view of the absence of any evidence of "fraud," as we previously noted.

II.

We also reject defendants' claim that the court abused its discretion in denying their motion to file an amended responsive pleading. The judge did not abuse his discretion when he noted that any "modifications to the pleadings at this late date [were] merely an effort to manufacture what might be a defense to hold up the proceeding until such time as there can be further motions made to [***25] strike them." See Stuchin v. Kasirer, 237 N.J. Super. 604, 609, 568 A.2d 907 (App.Div.) (holding that since the "showing of fraud was marginal at best, and the amendment would only have protracted [the] litigation," there was no abuse of judicial discretion in denying the amendment), *certif. denied*, 121 N.J. 660, 583 A.2d 346 (1990). While we recognize that such amendments should be "freely given in the interest of justice," R. 4:9-1, we perceive no abuse of discretion by the motion judge in determining to disallow the filing of an amended pleading to assert these new theories where they could not be supported on this record.

Accordingly, we affirm the summary judgment entered in favor of plaintiffs on their complaint.

LEXSEE

**YESENIA NIETO, individually and on behalf of all others similarly situated.
Plaintiff, v. PERDUE FARMS, INCORPORATED, a Maryland Corporation,
Defendant.**

Case No. 08-07399

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION**

2010 U.S. Dist. LEXIS 25256

March 17, 2010, Decided

March 17, 2010, Filed

COUNSEL: [*1] For Yesenia Nieto, and on behalf of all others similarly situated, Plaintiff: George K Lang, LEAD ATTORNEY, Julie D Miller, Paul M. Weiss, Freed & Weiss LLC, Chicago, IL.

For Perdue Farms, Incorporated, a Maryland corporation, Defendant: Bart Thomas Murphy, Ice Miller LLP, Lisle, IL; Joan Grace Ritchey, ICE MILLER, Chicago, IL; Michael K Madden, PRO HAC VICE, Venable, LLP, New York, NY; Roger A Colaizzi, PRO HAC VICE, Venable LLP, Washington, DC.

JUDGES: Honorable Virginia M. Kendall, United States District Court Judge.

OPINION BY: Virginia M. Kendall

OPINION

MEMORANDUM OPINION AND ORDER

Plaintiff Yesenia Nieto ("Nieto") filed suit against Defendant Perdue Farms, Incorporated ("Perdue") individually and on behalf of all others similarly situated, alleging unjust enrichment (Count I), a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, [815 ILCS 505/1 et seq.](#) (Count II) or, alternatively, a violation of the Maryland Consumer Protection Act, [Md. Code Ann., Com. Law, §§ 13-301 et seq.](#) (Alternative Count II), and seeking declaratory relief pursuant to [28 U.S.C. § 2201](#) (Count III). Perdue moves to dismiss Nieto's Second Amended Complaint for failure to state a claim upon which relief can be [*2] granted. For the reasons stated below, Perdue's Motion to Dismiss is granted.

BACKGROUND

The following facts are taken from Plaintiff's Amended Complaint and are assumed to be true for purposes of this Motion to Dismiss. See [Murphy v. Walker, 51 F.3d 714, 717 \(7th Cir. 1995\)](#). Perdue, a company that processes chickens for consumers, distributes whole chickens and cut-up chicken portions for sale in grocery stores. Whole chickens contain giblets, a culinary term referring to the fowl's offal including the heart, gizzard, liver, and neck. Cut-up chicken portions do not come with giblets. Because Perdue sells more cut-up chicken portions than whole chickens, it has "an enormous quantity of extra giblet parts to dispose of" (Compl. P 1.) Perdue sells its extra giblets in packets for consumer use and also sells them to pet food manufacturers. Despite its efforts, Perdue cannot sell all of the extra giblets; therefore, it must pay to properly dispose of them.

Nieto alleges that starting no later than October 13, 2003, and continuing to the present day, "Perdue has [had] a secret practice of disposing of additional giblet parts by inserting them (e.g., more than one heart, liver, gizzard [*3] or neck per bird) into Perdue whole chicken sold at retail." (Compl. P 2) (emphasis omitted.) Because consumers pay for Perdue whole chickens by the pound, Perdue's practice of stuffing extra giblets into whole chickens increases the total weight of a whole chicken, effectively forcing consumers to subsidize Perdue's costs of disposing of the extra giblets. Nieto claims that the extra giblet weight can add up to 1/4 pound or more to each chicken.

Nieto alleges that Perdue concealed the inclusion of these extra giblets in its communications with its customers "through advertising generally and at the point of sale." (Compl. P 17). Though Nieto cannot point specifically to any individual by name, she alleges that

"those at Perdue responsible for (1) placing giblets into giblet packs, (2) placing giblet packs into whole birds, (3) giblet waste management, and (4) overseeing and auditing these processes and policies are important to this fraud." *Id.*

STANDARD OF REVIEW

When considering a motion to dismiss under [Rule 12\(b\)\(6\)](#), the Court accepts as true all facts alleged in the complaint and construe all reasonable inferences in favor of the plaintiff. See [Murphy](#), 51 F.3d at 717. To state a [*4] claim upon which relief can be granted, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." [Fed. R. Civ. P. 8\(a\)\(2\)](#). "Detailed factual allegations" are not required, but the plaintiff must allege facts that, when "accepted as true, . . . 'state a claim to relief that is plausible on its face.'" [Ashcroft v. Iqbal](#), 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). In analyzing whether a complaint has met this standard, the "reviewing court [must] draw on its judicial experience and common sense." [Iqbal](#), 129 S.Ct. at 1950. A claim has facial plausibility when the pleaded factual content allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. See [id.](#) at 1949.

Perdue also moves to dismiss on the grounds that Nieto has not met the heightened pleading standard set forth in [Rule 9](#). [Rule 9](#) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." [Fed. R. Civ. P. 9](#). This heightened pleading requirement was intended to protect against the "great harm to the [*5] reputation of a business firm or other enterprise a fraud claim can do." [Borsellino v. Goldman Sachs Group, Inc.](#), 477 F.3d 502, 507 (7th Cir. 2007). To satisfy the requirements of [Rule 9](#), a plaintiff must set forth "the who, what, when, where, and how" of the alleged fraud. [DiLeo v. Ernst & Young](#), 901 F.2d 624, 627 (7th Cir. 1990).

DISCUSSION

I. Subject Matter Jurisdiction

Nieto claims federal subject matter jurisdiction pursuant to [28 U.S.C. § 1332\(d\)\(2\)\(A\)](#), the Class Action Fairness Act ("CAFA"). CAFA grants federal jurisdiction over a "mass action," that is, a Federal Rule of Civil Procedure 23 class action meeting three criteria: (1) at least 100 members in the class, [28 U.S.C. § 1332\(d\)\(11\)\(B\)](#); (2) with at least \$ 5,000,000 at issue, [28 U.S.C. § 1332\(d\)\(2\)](#); (3) where any defendant and any class member are citizens of diverse states ("minimal

diversity"), [28 U.S.C. § 1332\(d\)\(2\)\(A\)](#). See [Hart v. FedEx Ground Package Sys.](#), 457 F.3d 675 (7th Cir. 2006). That Nieto's class has not yet been certified does not preclude jurisdiction under CAFA. See [Cunningham Charter Corp. v. Learjet, Inc.](#), 592 F.3d 805, 806 (7th Cir. 2010) ("federal jurisdiction under the Class Action Fairness Act does not [*6] depend on certification . . .").

Although Nieto has not specifically addressed these three requirements, all have been satisfied. First, Nieto has defined the class as "[a]ll persons who purchased a Perdue whole chicken at retail from October 13, 2003 to present," which, if certified, would surely exceed 100 members and satisfy CAFA's first requirement. (Compl. P 17). Second, given the large number of plaintiffs, and that the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") permits recovery of punitive damages and attorney's fees, it is plausible that the amount in controversy will exceed \$ 5,000,000. See [Oshana v. Coca-Cola Co.](#), 472 F.3d 506 (7th Cir. 2006) (CAFA's amount in controversy requirement satisfied even though the plaintiff did not specify the amount in controversy, because ICFA permitted recovery of punitive damages). Finally, Nieto, a citizen of Illinois, and Perdue, a citizen of Maryland, are citizens of diverse states. Nieto has therefore established subject matter jurisdiction.

II. Lack of Particularity in Pleading

Perdue moves to dismiss Nieto's consumer fraud claim (Count II and Alternative Count II) asserting that Nieto's Complaint fails to meet [*7] the heightened pleading requirements of [Federal Rule of Civil Procedure 9\(b\)](#). The Complaint alleges that Perdue violated the ICFA, or alternatively, the Maryland Consumer Protection Act, by disposing of additional giblets through inserting them into Perdue whole chickens sold, by the pound, at retail.

To state a claim under the ICFA, Nieto must allege: 1) a deceptive act or practice by Perdue; 2) Perdue's intent that Nieto rely on the deception; 3) that the deception occurred in the course of conduct of trade or commerce; 4) actual damage to Nieto; and 5) that the damage was proximately caused by Perdue. See [Avery v. State Farm Mut. Auto Ins. Co.](#), 216 Ill. 2d 100, 835 N.E.2d 801, 850, 296 Ill. Dec. 448 (Ill. 2005). A complaint alleging a violation of the ICFA must be pleaded with the same particularity as common law fraud and must meet the heightened pleading standard of [Rule 9\(b\)](#). See [Davis v. G.N. Mortgage Corp.](#), 396 F.3d 869, 883 (7th Cir. 2005) (consumer fraud claims must be pleaded with the same level of specificity required by [Rule 9\(b\)](#)); see also [Pirelli v. Walgreen Co.](#), 09-cv-2046, 2009 U.S. Dist. LEXIS 77648, 2009 WL 2777995, *4 (N.D. Ill. Aug. 31, 2009) (Kendall, J.) (same). "While

[Rule 9(b)] does not require a plaintiff to plead facts [*8] that if true would show that the defendant's alleged misrepresentations were indeed false, it does require the plaintiff to state 'the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.'" Uni*Quality, Inc. v. Infotronx, Inc., 974 F.2d 918, 923 (7th Cir. 1992).

Nieto claims that she has met the heightened standard by specifying the "who, what, when, where, and how" of this alleged fraud. To begin, Nieto does not specify any individual who misrepresented or concealed any relevant fact, but generally alleges that "those at Perdue responsible for (1) placing giblets into giblet packs, (2) placing giblet packs into whole birds, (3) giblet waste management, and (4) overseeing and auditing these processes and policies are important to this fraud." To satisfy Rule 9(b)'s heightened standard, however, Nieto must allege the "identity of the person who made the misrepresentation . . ." Uni*Quality, 974 F.2d at 923 (emphasis added); see United States v. All Meat & Poultry Prods. Stored at Lagrou Cold Storage, 470 F. Supp. 2d 823 (N.D. Ill. Jan. 3, 2007) ("Rule 9(b) [*9] requires specifics such as the name of the individual who made the statement . . ."). Here, Nieto failed to identify the *names* of the people alleged to be "important" to this fraud. More importantly, Nieto does not allege in what capacity these people were involved in the alleged fraud, nor does she allege that these people made any misrepresentations--rather only that they are "important" to the fraud. This alone precludes the Complaint from satisfying Rule 9(b).

The vague time period stated for the allegedly fraudulent activity is also insufficient to meet Rule 9(b)'s requirements. Nieto alleges that Perdue began its fraudulent practice "no later than October 13, 2003, continuing through the time of Plaintiff's purchase of a whole chicken on October 13, 2008, and on an ongoing basis continuing to this day," and that it took place "in its communications with Plaintiff and the Class members . . . through advertising generally and at the point of sale." There appears to be no factual basis for the initial date of October 13, 2003, other than it is exactly five years prior to the date on which Nieto purchased her chicken. As such, the only date provided and supported by facts is the date [*10] of Nieto's purchase. While exact dates of each alleged misrepresentation are not required, providing such a vague time frame is insufficient to satisfy Rule 9(b)'s heightened pleading requirements.

Nieto's allegations with regard to the "what" and "how" of the fraudulent activity are similarly inadequate. Nieto alleges that Perdue "knew and fraudulently concealed and/or intentionally failed to disclose . . . that

Perdue was passing off its excess giblet waste." (Compl. P 17). Nieto alleges no facts supporting this claim, rather only stating that her experience--finding extra giblets in one chicken--and "her attorney's investigation . . . reveal the passing off of extra giblets on consumers is not an isolated event but a policy and/or procedure which is an accepted means of giblet disposal by Perdue." *Id.* Tellingly, Nieto does not disclose any factual findings from her attorney's investigation that would support her allegations. Instead, the only fact provided is that Nieto found extra giblets in one chicken. Nieto also alleges that Perdue did not notify customers of its policy to insert these extra giblets into each chicken, but Nieto does not provide any facts suggesting the existence [*11] of such a policy. These conclusory assertions are not enough to put Perdue on notice of the specific allegations to which it must respond.

Because Nieto has failed to plead with specificity the who, what, where, when, and how of the alleged fraud, it has failed to state claim against Perdue under the ICFA and Count II of the SAC is dismissed. Since Maryland's Consumer Protection Act similarly must be pleaded with the same level of specificity required by Rule 9(b), Alternative Count II of the SAC is also dismissed. See Adams v. NVR Homes, Inc., 193 F.R.D. 243, 251-52 (D.Md. 2000) (applying Rule 9(b)'s heightened pleading requirements to allegation of fraud under Maryland Consumer Protection Act); Johnson v. Wheeler, 492 F. Supp. 2d 492, 509 (D.Md. 2000) ("[B]ecause fraud is at the heart of Defendants' alleged violations of the [Maryland Consumer Protection Act], Federal Rule of Civil Procedure 9(b)'s requirement of particularity in the pleading of fraud must apply.").

III. Unjust Enrichment

Nieto also brings a claim for unjust enrichment, seeking to recover from Purdue the amounts wrongfully collected as a result of its alleged practice of adding extra giblets to each chicken. Unjust [*12] enrichment is not a self-sufficient claim, however, but must rely upon an underlying claim of fraud or breach of fiduciary duty. See Harris Trust & Sav. Bank v. Salomon Bros, 832 F.Supp 1169, 1176 (N.D.Ill.1993) (citing Charles Hester Enters., Inc. v. Illinois Founders Ins. Co., 137 Ill. App. 3d 84, 484 N.E.2d 349, 354, 91 Ill. Dec. 790 (5th Dist.1985), *aff'd* 114 Ill. 2d 278, 499 N.E.2d 1319, 102 Ill. Dec. 306 (Ill.1986)). Here, Nieto claims that she has alleged a breach of fiduciary duty by stating that "consumers reasonably expect that if Perdue knew that its chickens had additional giblets, and the extra weight, that a company such a Perdue would make a disclosure to consumers; and/or that a company such as Perdue would not include extra giblets from the per pound price." (Compl. P 17). Nieto does not cite any legal

authority for the proposition that this expectation equates to a fiduciary duty on Perdue's part, however.

Regardless, since Nieto's unjust enrichment claim sounds in fraud, and as described above fails to meet the particularity requirements of [Rule 9\(b\)](#), Count I of the SAC is dismissed. See [In re Sears, Roebuck & Co. Mktg. & Sales Practices Litig.](#), No. MDL-1703, 2009 U.S. Dist. LEXIS 28830, 2009 WL 937256, at *11 (N.D. Ill. Apr. 6, 2009) (Grady, J.) (dismissing unjust [*13] enrichment claims of plaintiffs who failed to adequately plead fraud under [Rule 9\(b\)](#)); [Pirelli](#), 2009 U.S. Dist. LEXIS 77648, 2009 WL 2777995, at *7 ("[Plaintiff]'s Complaint fails to state a claim of fraud against [defendant] and therefore its claim for unjust enrichment must be dismissed.").

IV. Declaratory Relief

In Count III, Nieto seeks declaratory relief pursuant to [28 U.S.C. § 2201](#). Under the Declaratory Judgment Act, "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration" [28 U.S.C. § 2201](#). The Declaratory Judgment Act does not confer substantive rights; it is merely a procedural remedy. See [Powers v. United States](#), 218 F.2d 828, 829 (7th Cir. 1954). Therefore, suits under the Declaratory Judgment Act "must present a recognizable previously existing justiciable controversy" *Id.* Nieto bears the burden of establishing that a controversy exists. See [Cardinal Chem. Co. v. Morton Int'l Inc.](#), 508 U.S. 83, 95, 113 S. Ct. 1967, 124 L. Ed. 2d 1 (1993). Since Nieto has failed to adequately plead a violation of the Illinois Consumer Protection Act, a violation [*14] of the Maryland Consumer Protection Act, or a claim of unjust enrichment, Nieto has not pleaded sufficient facts to show the existence of a substantial controversy that would warrant a declaratory judgment. Count III of the SAC is dismissed.

V. Dismissal With Prejudice

Perdue argues that after repeated opportunities to amend, Nieto is still unable to sufficiently allege any claims against it, and that her Second Amended Complaint should therefore be dismissed with prejudice. "[W]here the plaintiff has repeatedly failed to remedy the same deficiency, the district court [does] not abuse its discretion by dismissing the claim with prejudice." [General Elec. Capital Corp. v. Lease Resolution Corp.](#), 128 F.3d 1074, 1085 (7th Cir. 1997). Nieto has failed to allege any additional facts to support her claims, and to permit further amendments would be futile. See [Airborne Beepers & Video, Inc. v. A.T.&T. Mobility LLC](#), 499 F.3d 663, 666 (7th Cir. 2007) (leave to amend may be denied where previous amendments have not cured identified deficiencies). Therefore, Count I, Count II, Alternative Count II, and Count III are dismissed with prejudice.

CONCLUSION AND ORDER

Nieto has established federal subject [*15] matter jurisdiction under the Class Action Fairness Act. However, she has failed to allege sufficient facts to satisfy [Rule 9\(b\)](#)'s heightened pleading standard, and therefore has not stated a claim under either the ICFA or the Maryland Consumer Protection Act. Because Nieto has not established a claim of fraud or breach of fiduciary duty, she cannot sustain a claim for unjust enrichment. Further, she has not adequately presented a justiciable controversy, and is therefore not entitled to declaratory relief. Repeated attempts to cure these pleading deficiencies have not proved fruitful.

Perdue's Motion to Dismiss is granted. The Second Amended Complaint is dismissed, in its entirety, with prejudice.

/s/ Virginia M. Kendall

Virginia M. Kendall

United States District Court Judge

Northern District of Illinois

Date: March 17, 2010

LEXSEE

GILBERT NOBLE, individually and on behalf of a class of similarly situated persons, Plaintiffs, v. PORSCHE CARS NORTH AMERICA, INC., Defendant.

Civil Action No. 2:08-3658 (SDW)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2010 U.S. Dist. LEXIS 14454

February 18, 2010, Decided

February 19, 2010, Filed

COUNSEL: [*1] For GILBERT NOBLE, individually and on behalf of a class of similarly situated persons, Plaintiff: BRUCE HELLER NAGEL, ROBERT H. SOLOMON, LEAD ATTORNEYS, ANDREW LOWE O'CONNOR, NAGEL RICE, LLP, ROSELAND, NJ; ELLIOTT LOUIS PELL, LEAD ATTORNEY, NAGEL RICE LLP, ROSELAND, NJ.

For PORSCHE CARS NORTH AMERICA, INC., a Georgia Corporation, Defendant: JOSEPH KERNEN, LEAD ATTORNEY, MATTHEW A. GOLDBERG, DLA PIPER LLP (US), Philadelphia, PA; ERIC M. HENRY, DLA PIPER RUDNICK GRAY CARY US LLP, PHILADELPHIA, PA.

JUDGES: Susan D. Wigenton, United States District Judge.

OPINION BY: Susan D. Wigenton

OPINION

WIGENTON, District Judge.

Before the Court is Defendant Porsche Cars North America, Inc.'s ("PCNA" or "Defendant") Motion to Dismiss Plaintiff Gilbert Noble's ("Noble" or "Plaintiff") Amended Class Action Complaint ("Amended Complaint") pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). This Court has jurisdiction over this matter pursuant to [28 U.S.C. §§ 1332\(a\)](#); and [1332\(d\)\(2\)\(A\)](#). Venue is proper in this District pursuant to [28 U.S.C. § 1391\(b\)](#). The Motion is decided without oral argument pursuant to [Fed. R. Civ. P. 78](#). For the reasons discussed below, the Court grants Defendant's Motion.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is the purchaser [*2] of an allegedly defective 1999 Porsche 911 Carrera Coupe ("Porsche

911" or "vehicle"). Plaintiff seeks to bring a class action complaint "on behalf of himself and all other persons who purchased a [...] Porsche 911 [...] which vehicle had or currently has the defective Porsche 996 water-cooled engine and have incurred or will incur fees for the service, repair and/or replacement" of said engine. (Am. Compl. P 25.)

Plaintiff purchased his vehicle in 2005 from a Buy Right Dealership in Union City, New Jersey. (*Id.* P 15.) The vehicle was manufactured during the first year that Defendant began equipping their products with a new 996 water-cooled engine ("engine") instead of the older air-cooled engines. (*Id.* P 19.) Plaintiff's vehicle was equipped with the "new" engine. (*Id.* P 2.) Plaintiff used and maintained the vehicle without incident until October 2006, when he noticed "large quantities of smoke being emitted from the tail pipe." (*Id.* PP 16, 17.) Plaintiff contacted a mechanic, who recommended he take the vehicle to a Porsche specialist. (*Id.* P 18.) Plaintiff had the vehicle towed to Protosport, a Porsche specialist in Pompton Plains, New Jersey. (*Id.*) A Protosport representative found [*3] that antifreeze had leaked into the vehicle's engine oil through a defective cylinder, irreparably damaging the engine. (*Id.* PP 19, 20.) The Protosport representative informed Plaintiff that he "had previous experience with this same engine problem" and told Plaintiff that the leak was due to a latent manufacturer design defect in the engine. (*Id.* P 19.)

Plaintiff reported his vehicle's defect to Defendant "on multiple occasions." (*Id.* P 21.) However, Defendant refused to cover the cost of replacing Plaintiff's engine and his "related out-of-pocket expenses" because the vehicle was "currently more than four years outside of its 4yr/50,000 mile new car limited warranty . . ." (*Id.* P 22.) Additionally, the Defendant informed the Plaintiff that his vehicle was not eligible for "goodwill consideration"

because goodwill funds are "utilized at PCNA's discretion and are reserved for individuals who have purchased products new from a franchised retail dealership." (*Id.*)

On July 22, 2008, Plaintiff commenced the instant action by filing a Class Action Complaint and Jury Demand asserting two causes of action against PCNA sounding in "Strict Products Liability" pursuant to [N.J. STAT. ANN. 2A:58C-1, et seq.](#) [*4] and "Breach of Express Warranty" (the "Complaint"). On March 27, 2009, PCNA moved to dismiss the Complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#). On September 3, 2009, Plaintiff filed the Amended Complaint which replaced his breach of warranty and statutory strict liability claims, with claims for common law strict liability and violation of New Jersey's Consumer Fraud Act, [N.J. STAT. ANN. 56:8-1](#). On September 11, 2009, Defendant filed the current Motion to Dismiss.

MOTION TO DISMISS STANDARD

The adequacy of pleadings is governed by [Fed. R. Civ. P. 8\(a\)\(2\)](#), which requires that a complaint allege "a short and plain statement of the claim showing that the pleader is entitled to relief." This Rule "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal citations omitted); see also [Phillips v. County of Allegheny](#), 515 F.3d 224, 232 (3d Cir. 2008) (Rule 8 "requires a 'showing' rather than a blanket assertion of an entitlement to relief." (citation omitted)). In considering [*5] a Motion to Dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#), the Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." [Phillips](#), 515 F.3d at 231 (quoting [Pinker v. Roche Holding Ltd.](#), 292 F.3d 361, 374 n.7 (3d Cir. 2002)). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." [Ashcroft v. Iqbal](#), 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing [Twombly](#), 550 U.S. at 555). As the Supreme Court has explained:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for [*6] more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

[Iqbal](#), 129 S. Ct. at 1949 (quoting [Twombly](#), 550 U.S. at 556-57, 570) (internal citations omitted). Determining whether the allegations in a complaint are "plausible" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." [Iqbal](#), 129 S. Ct. at 1950 (citation omitted). If the "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," *Id.*, the complaint should be dismissed for failing to "show[] that the pleader is entitled to relief" as required by [Rule 8\(a\)\(2\)](#).

DISCUSSION

I. Count I -- Strict Liability

In count one of the Amended Complaint, Plaintiff pleads a common law cause of action for strict liability.¹ Defendant argues that Plaintiff's tort claim is precluded by the economic loss doctrine. Plaintiff on the other hand contends that the economic loss doctrine does not apply in this case because the antifreeze leakage and resulting smoke [*7] poses a serious risk to persons and/or property other than the Porsche 911s themselves.

1 Plaintiff acknowledges that his claim is expressly excluded from the language found in New Jersey's Product Liability Act. (Pl.'s Br. 3); see also [N.J. STAT. ANN. § 2A:58C-1\(b\)\(2\)](#).

The economic loss doctrine generally "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract." [Duchesne Light Co. v. Westinghouse Elec. Corp.](#), 66 F.3d 604, 618 (3d Cir. 1995). Specifically, it bars tort claims for harm sustained to the product alone, as opposed to harm to persons or other property damage. The New Jersey Supreme Court reasoned that "[w]hen the harm suffered is to the product itself, unaccompanied by personal injury or property damage . . . principles of contract, rather than of tort law, [are] better suited to resolve the purchaser's claim." [Alloway v. Gen. Marine](#)

Indus., L.P., 149 N.J. 620, 632, 695 A.2d 264 (1997) (holding that an individual plaintiff was limited to remedies under the U.C.C. when seeking to recover for purely economic loss); see also Goldson v. Carver Boat Corp., 309 N.J. Super. 384, 397, 707 A.2d 193 (App. Div. 1998) (holding that where damage is confined [*8] to an allegedly defective product itself, plaintiffs' remedies are confined to contract law). In this case, Plaintiff's only alleged injury is to his vehicle. Thus, in most cases, Count I would be precluded by the economic loss doctrine. Plaintiff, however, claims there is an exception to the economic loss doctrine where the defect "projects a substantial risk of causing a sudden, unexpected and calamitous accident causing serious harm to persons or other property." (Am. Compl. P 5.)

Courts in this District have already held that "New Jersey law contains no 'sudden and calamitous' exception to the economic loss doctrine." Naporano Iron & Metal Co. v. American Crane Corp., 79 F. Supp. 2d 494, 504 (D.N.J. 1999); see also Millman v. Subaru of America, Inc., No. 07-4846, 2008 U.S. Dist. LEXIS 17257, 2008 WL 623032, at *3 (D.N.J. Mar. 6 2008) (dismissing Plaintiff's product liability claim and holding there is no "sudden and calamitous" exception to the economic loss doctrine in New Jersey law). Furthermore, this Court is unaware of any New Jersey court recognizing this exception.² See Green v. General Motors Corp., No. A-2831-01T-5, 2003 WL 21730592, at * 5 (App. Div. July 10, 2003) ("[a]s a final matter, we note [*9] that in the six years since *Alloway*, the Court has not sought to implement the potential ['sudden and calamitous'] exception recognized in that decision or to expand the scope of tort law in any other respect in connection with claims of pure economic loss."); see also Trans Hudson Express, Inc. v. Nova Bus Co., No. 06-4092, 2007 U.S. Dist. LEXIS 26724, 2007 WL 1101444, at * 5 (D.N.J. Apr. 10, 2007) (holding that "it is reasonable to assume that the New Jersey Supreme Court would... reject[] the 'sudden and calamitous' exception to the economic loss doctrine" and explaining that plaintiff's remedy was appropriately governed by the U.C.C.).

2 The Third Circuit in Consumers Power Co. v. Curtiss-Wright Corp., 780 F.2d 1093 (3d Cir. 1986), did recognize a "sudden and calamitous" exception to the economic loss doctrine. However, despite the Third Circuit's holding in *Consumers Power*, the New Jersey Supreme Court has not yet resolved the issue of whether the U.C.C. or tort law controls where the defective product at issue poses a serious risk to other property or persons, but ultimately only causes harm to the product itself. See, e.g., Alloway, 695 A.2d at 273 (explaining that "in this case we do not resolve the issue [*10] whether

tort or contract law applies to a product that poses a risk of causing personal injuries or property damage but has caused only economic loss to the product itself"). Nevertheless, one year after the *Alloway* decision was rendered, the Appellate Division, in *Goldson*, chose to address the very issue left unresolved by the New Jersey Supreme Court and held that there was no such exception. Goldson, 309 N.J. Super. at 397. Furthermore, in *Naporano*, the Court addressed the tension between *Goldson* and *Consumers Power* stating that although "this Court is constrained to follow and apply" Third Circuit precedent, "[t]his court need not follow *Consumers Power* if it is clear that the present state of New Jersey law is such that a different result is clearly dictated." Naporano, 79 F.Supp.2d at 501. Consequently, in light of the overwhelming authority and precedent supporting it, this Court agrees with the courts in *Goldson* and its progeny.

Likewise, Plaintiff's strict liability claim is appropriately remedied under contract law.³ Consequently, Count I of the Amended Complaint is dismissed.

3 New Jersey has adopted the U.C.C. to govern commercial transactions such as the purchase and sale [*11] of goods. See generally N.J. Stat. Ann. §§ 12A:2-102, et seq.

II. Count II -- New Jersey Consumer Fraud Act

To state a claim under New Jersey's Consumer Fraud Act ("CFA") a plaintiff must plead "three elements: (1) unlawful conduct ...; (2) an ascertainable loss ...; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 389, 929 A.2d 1076 (2007) (citation omitted); see also Ramirez v. STi Prepaid LLC, 644 F. Supp. 2d 496, 500 (D.N.J. 2009) (outlining pleading elements for claims under CFA). In this case, Defendant argues, among other things, that Plaintiff cannot prove the second element necessary to maintain his CFA claim (ascertainable loss) because the Porsche 911 performed under its warranty. This Court agrees.

New Jersey courts have not provided clear precedent for the specific facts alleged in the present case -- a plaintiff claiming an ascertainable loss for an allegedly dangerous and defective automobile, four (4) years out of its warranty -- and so, in accordance with *Erie R.R. Co. v. Tompkins*, the Court must anticipate how the New Jersey Supreme [*12] Court would rule based upon the alleged facts. 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188

(1938); see also *Scotts African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 98 F.3d 78, 92 (3d Cir. 1996) (stating that where applicable state law is unclear, federal court sitting in diversity must predict how state's highest court would rule).

In accordance with New Jersey law, this Court holds that a plaintiff cannot maintain an action under New Jersey's CFA when the only allegation is that the defendant "provided a part -- alleged to be substandard -- that outperforms the warranty provided." *Perkins v. DaimlerChrysler Corp.*, 383 N.J. Super. 99, 112, 890 A.2d 997 (App. Div. 2006) (holding that "a claim that a defect may, but has not, manifested itself until after the expiration of the warranty period cannot form the basis for a claim under the CFA."); see also *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 251, 872 A.2d 783 (2005) ("[t]he defects that arise and are addressed by warranty, at no cost to the consumer, do not provide the predicate 'loss' that the CFA expressly requires for a private claim under the CFA, bringing with it the potential for treble damages, attorney's [*13] fees, and the court costs and fees").

In *Perkins*, the plaintiffs appealed the trial court's dismissal of the plaintiffs' class action claims under the CFA for failure to state a claim. *Perkins*, 383 N.J. Super. at 104. On appeal, the Appellate Division held that the manufacturer's failure to advise the vehicle owner that her exhaust manifold may breakdown or require repair after the expiration of the warranty period could not constitute a violation of the CFA. *Perkins*, 383 N.J. Super. at 99. The Court reasoned that:

To interpret the CFA, beyond its present scope, to cover claims that the component part of a product, which has lasted through the warranty period, may eventually fail, would be tantamount to rewriting that part of contract which defined the length and scope of the warranty period. . . . [which] would also have a tendency to extend those warranty programs for the entire life of the vehicle.

Id. at 113. Though the Court in *Perkins* was careful to note that its decision did not address "those circumstances in which safety concerns might be implicated," we agree with the Appellate Division's rationale and find its holding just as applicable here, in a case where safety concerns [*14] are alleged. *Id.* at 111. A recent opinion from the Court is instructive.

In *Duffy v. Samsung Electronics America, Inc.*, plaintiff filed a class action complaint alleging, among

other things, a violation of the CFA. No. 06-5259, 2007 U.S. Dist. LEXIS 14792, 2007 WL 703197 (D.N.J. March 2, 2007). The plaintiff in *Duffy* claimed that his Samsung Microwave oven was manufactured with a defective part that caused his microwave to turn on without human operation and catch on fire. 2007 U.S. Dist. LEXIS 14792, [WL] at *2. He further alleged that the defect in his microwave was the same defect attributed to nearly 184,000 Samsung microwave ovens installed in recreational vehicles ("RV") sold in the U.S.. *Id.* According to the plaintiff, Samsung was aware of the defect in microwaves installed in both the RVs and homes; however, Samsung, in cooperation with the United States National Highway Traffic Safety Administration ("NHTSA"), issued a recall only for the RV microwaves but not ones installed in homes. *Id.* Plaintiff alleged that the limited recall took place because NHTSA's jurisdiction to order recalls was limited to vehicles and thus similar or identical microwaves installed in homes were not recalled despite the fact that they also contained the [*15] defective part and presented identical fire hazards. *Id.* Significantly, however, the plaintiff's microwave was subject to a limited warranty that had expired at the time his microwave's defect became apparent. 2007 U.S. Dist. LEXIS 14792, [WL] at *1. In dismissing the plaintiff's complaint under the CFA, this Court, citing *Perkins*, found that the plaintiff could not prove he had an ascertainable loss:

[B]ecause Plaintiff's microwave continued to perform beyond the period in which Samsung was contractually bound to repair or replace any defective part, Plaintiff cannot maintain a CFA claim. To recognize Plaintiff's claim would essentially extend the warranty period beyond that to which the parties agreed.

2007 U.S. Dist. LEXIS 14792, [WL] at * 8.

Likewise, in this case, the Porsche 911's "defective" engine outperformed its limited warranty. As alleged in the Amended Complaint, Plaintiff's vehicle, which he purchased "used" in 2005, was originally subject to a "4-year/50,000 mile new car limited warranty." (Am. Compl. P 7.) Plaintiff has not alleged he purchased his car with any additional warranty. Furthermore, at the time the defect manifested itself, Plaintiff's car was more than four (4) years outside of its original warranty. (*Id.* P 22.) This [*16] Court refuses to re-write a warranty that expired over four years ago. Thus Count II of the Amended Complaint will be dismissed. ⁴

4 It should be noted that a recent opinion from this District could be interpreted to question *Duffy's* holding and the interpretation of *Thiedmann* and *Perkins*. In *Maniscalco v. Brother Intern. Corp. (USA)*, the Court declined to extend *Perkins* to a situation where the extended warranty had expired at the time the complained defect manifested itself. [627 F. Supp. 2d 494 \(D.N.J. 2009\)](#). However, the facts in *Maniscalco* are markedly different than the ones found here. In *Maniscalco*, it was held that purchasers, who made specific allegations that a manufacturer *purposefully limited* the warranty period of allegedly defective printers so that the printer heads would fail after warranty coverage expired (but prior to the product's expected useful life) and marketed the product to uninformed consumers anyway in order to maximize profits, had sufficiently plead a CFA action. *Id.* at 501-02. In this case, Plaintiff makes no such allegations. In fact, according to the Amended Complaint, the Porsche 911 lasted *four (4) years*

past the initial warranty period. Furthermore, [*17] though the Court in *Maniscalco* held that the defendant's warranty defense was inapplicable, it applied the warranty defense in the context of finding that plaintiff sufficiently plead an unlawful act (the first element required to state a claim under the CFA), and did not fully discuss the defense's applicability to whether plaintiff had sufficiently pled an ascertainable loss. *Id.* at 502-03.

CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss is GRANTED and the Amended Complaint is DISMISSED.

SO ORDERED.

/s/ Susan D. Wigenton

Susan D. Wigenton, U.S.D.J.

LEXSEE

**DON C. PERKINS, PLAINTIFF-APPELLANT, - VS - LAND ROVER OF AKRON,
DEFENDANT-APPELLEE.**

CASE NO. 03 MA 33

**COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT,
MAHONING COUNTY**

2003 Ohio 6722; 2003 Ohio App. LEXIS 6014

December 5, 2003, Decided

PRIOR HISTORY: [**1] CHARACTER OF PROCEEDINGS: Civil Appeal from Mahoning County Common Pleas Court, Case No. 01 CV 974.

DISPOSITION: Judgment affirmed in part and reversed in part; cause remanded.

COUNSEL: For Plaintiff-Appellant: Attorney Warren Bo Pritchard, Youngstown, OH.

For Defendant-Appellee: Attorney Robert C. Meyer, Buckingham, Doolittle & Burroughs, LLP, Canton, OH.

JUDGES: Hon. Mary DeGenaro, Hon. Cheryl L. Waite, Hon. Joseph J. Vukovich. Waite, P.J., and Vukovich, J., concur.

OPINION BY: Mary DeGenaro

OPINION

DeGenaro, J.

[*P1] This timely appeal comes before this court on the record on appeal and the parties' briefs. Plaintiff-Appellant, Don Perkins, appeals the decision of the Mahoning County Court of Common Pleas which granted summary judgment in favor of the Defendant-Appellee, Land Rover of Akron. The issues before this court are whether the sales contract between Land Rover and Perkins contained any warranties, whether Land Rover breached those warranties, and whether Land Rover fraudulently concealed certain defects at the time of the sale.

[*P2] The sales contract in this case contained an "as is" clause which precludes all implied warranties, but Perkins is still entitled to maintain a claim on any express warranty Land Rover made to him. As a

condition of the sale, Land Rover [*2] promised to fix the vehicle's air conditioning in the contract which created an express warranty. But Land Rover failed to point to any evidentiary materials of the type listed in [Civ.R. 56\(C\)](#) which demonstrate that there are no genuine issues of material fact concerning whether a faulty repair of the air conditioning caused the subsequent damage to the vehicle, leaving the factual dispute of this claim unresolved. Additionally, a buyer can maintain a fraud claim against a used car dealer even if the vehicle is sold "as is" if the dealer should have known of defects in the vehicle. But Perkins has presented no evidence other than the fact that the vehicle developed problems to show that Land Rover should have known of any alleged defect at the time of the sale. For these reasons, the trial court's decision is affirmed in part, reversed in part, and that this cause is remanded for further proceedings on Perkins's claim for breach of the express warranty covering the air conditioning repair.

Facts

[*P3] In 1999, Perkins was looking to buy a used vehicle. He found a vehicle and took it to Land Rover so they could recommend whether it was a good buy. After examining the vehicle, Land Rover's [*3] mechanic told him not to buy it since there were various problems. Land Rover then recommended a different used vehicle which it had on the lot, a 1993 Range Rover. Perkins did not ask about the vehicle's history, but was told it was a good vehicle. Perkins test-drove the vehicle for a few minutes and decided to purchase that vehicle the same day.

[*P4] The vehicle was sold "as is-no warranty". But in the sales contract, Land Rover agreed to make four modifications before it delivered the vehicle to Perkins. It agreed to install a brushbar, provide labor to install a roof rack, provide a bracket for a safari rack, and repair the air conditioning. Land Rover made the

promised changes and repairs and Perkins took possession of the vehicle about a week after agreeing to buy it.

[*P5] Soon after purchasing the vehicle, Perkins began to notice problems with it. The cooling light was always on, the stereo and cruise control did not work, the air suspension system broke, and the alternator had to be replaced. Perkins repeatedly took the vehicle back to Land Rover for repairs. About two years after buying the vehicle, it stopped working entirely. Perkins took the vehicle to an independent mechanic who [**4] reported that the heads on the vehicle had been replaced in the past and that either the block or a piston was cracked.

[*P6] Perkins subsequently filed a complaint against Land Rover alleging breach of contract and fraud and Land Rover filed an answer. Land Rover then moved for summary judgment, contending that Perkins' claims were precluded by the "as is" language in the sales contract. Perkins responded, arguing that the sales contract was not an "as is" contract since Land Rover agreed to make modifications to the vehicle and that it had a duty to tell him of the vehicle's defects prior to the sale. Land Rover moved to strike Perkins' response because it was untimely and because it did not comply with [Civ.R. 56\(C\)](#). In its judgment entry, the trial court stated it reviewed the motion and response and granted summary judgment to Land Rover on all claims.

Preliminary Issues

[*P7] Land Rover raises three preliminary issues which we must address before resolving the merits of Perkins' appeal. First, Land Rover argues this court should disregard Perkins' response to the motion for summary judgment since it was untimely filed. Mahoning County Court of Common Pleas Loc.R. 4(C)(2) provides that [**5] the party opposing any motion has fourteen days to respond to that motion unless an extension is granted. The decision over whether to grant an extension so a party can respond to a motion for summary judgment is within the sound discretion of the trial court. [Tilberry v. McIntyre \(1999\)](#), [135 Ohio App.3d 229, 234, 733 N.E.2d 636](#). The trial court's entry in this case specifically stated that it considered Perkins' response. Land Rover was not prejudiced by this decision in any way. Accordingly, the trial court did not abuse its discretion when it considered Perkins' response to the motion for summary judgment.

[*P8] Land Rover next argues we should disregard Perkins' response to its motion for summary judgment since he allegedly did not set forth specific facts showing that there are genuine issues for trial. It is true that a party opposing summary judgment must point to specific facts that demonstrate a genuine issue of material fact and not rest on mere allegations or denials in the

pleadings. [Dresher, supra](#). But there is no reason for us to disregard Perkins' response even if it does not contain a sufficient reason to deny summary judgment. If his response fails to [**6] set forth specific facts demonstrating a genuine issue for trial, then we will affirm the trial court's decision to grant summary judgment. If it does, then we will reverse the trial court's decision.

[*P9] Finally, Land Rover argues that an affidavit Perkins attached to his appellate brief should be stricken since it was not before the trial court when it was ruling on Land Rover's motion for summary judgment. It argues the first time this document appeared was on appeal. But Land Rover is wrong when it asserts that Perkins did not present this affidavit to the trial court. The same affidavit Perkins attached to his brief is attached to his response to Land Rover's motion for summary judgment. Accordingly, Perkins is not supplementing the record when he provides us with that affidavit.

Standard of Review

[*P10] Since we have determined that Land Rover's preliminary issues are meritless, we turn to the merits of Perkins' appeal. When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court and, therefore, engages in a de novo review. [Parenti v. Goodyear Tire & Rubber Co. \(1990\)](#), [66 Ohio App.3d 826, 829, 586 N.E.2d 1121](#). [**7] Under [Civ.R. 56](#), summary judgment is only proper when the movant demonstrates that, viewing the evidence most strongly in favor of the non-movant, reasonable minds must conclude no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. [Doe v. Shaffer \(2000\)](#), [90 Ohio St.3d 388, 390, 2000 Ohio 186, 738 N.E.2d 1243](#). A fact is material when it affects the outcome of the suit under the applicable substantive law. [Russell v. Interim Personnel, Inc. \(1999\)](#), [135 Ohio App.3d 301, 304, 733 N.E.2d 1186](#).

[*P11] In a motion for summary judgment, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." [Dresher v. Burt \(1996\)](#), [75 Ohio St.3d 280, 296, 1996 Ohio 107, 662 N.E.2d 264](#). The nonmoving party has the reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. [Id. at 293](#).

[*P12] Perkins' sole assignment of error alleges:

[*P13] "The trial court erred in granting Defendant's motion for summary

judgment in that [**8] there are genuine issues as to material facts surrounding the conditions preceding the parties executing an "as is" contract and as to whether there was a concealment of defects in the vehicle which would constitute fraud."

[*P14] Perkins argues two issues within his assignment of error:

whether Land Rover was entitled to summary judgment on Perkins' breach of warranty claim and whether it was entitled to summary judgment on his fraud claim. We will address each issue separately.

Warranties During an "As Is" Sale

[*P15] Perkins argues the sale contract between he and Land Rover was not an "as is" contract since Land Rover promised to make certain repairs before he took possession of the vehicle. Land Rover argues the contract between it and Perkins is an "as is" contract, so Perkins has no claim against it.

[*P16] Most sales of goods, including used goods, involve either express or implied warranties. Buskirk v. Harrell (June 28, 2000), 4th Dist. No. 99CA31, 2000 Ohio App. LEXIS 3100. For instance, a seller generally warrants that a good is merchantable and fit for a particular use when it sells that good unless it conspicuously excludes those implied warranties in writing. R.C. 1302.29(B) [**9]. All implied warranties are excluded by expressions like "as is" unless the circumstances indicate otherwise. R.C. 1302.29(C)(1). The phrase "as is" describes the quality of the goods sold and in ordinary commercial usage it means that the buyer takes the entire risk as to the quality of the goods sold. Ins. Co. of N. Am. v. Automatic Sprinkler Corp. of Am. (1981), 67 Ohio St.2d 91, 94, 423 N.E.2d 151; Schneider v. Miller (1991), 73 Ohio App.3d 335, 339, 597 N.E.2d 175.

[*P17] In this case, Perkins acknowledged that he signed a document stating that Land Rover was selling the vehicle "as is". But he asserts this was not an "as is" sale since Land Rover promised to make certain modifications to the vehicle before delivery. His argument is incorrect.

[*P18] A sales contract may contain language negating or limiting any express warranties and any limiting language should be construed as consistent with any words or conduct creating an express warranty if

such a construction is possible. R.C. 1302.29(A). If the express warranty and the negation or limitation of that warranty cannot be reasonably construed together, then the express warranty [**10] prevails and the negation or limitation is inoperative as to that express warranty. Barksdale v. Van's Auto Sales, Inc. (1989), 62 Ohio App.3d 724, 727-728, 577 N.E.2d 426; R.C. 1302.29(A). But the same does not hold true for implied warranties. *Id.* Accordingly, an "as is" clause can preclude any claim based on an implied warranty, but cannot preclude any claim based on an express warranty.

[*P19] The facts in Barksdale are similar to those in this case. There, the plaintiff purchased a used car from the defendant. At the time of the sale, the buyer specifically asked about the transmission and was told there was nothing wrong with it. He then signed a contract which stated that the vehicle was being sold "as is". Two days after buying the vehicle, the car broke down and the buyer had to have the transmission rebuilt. The appellate court found that the "as is" clause precluded any claim for a breach of an implied warranty, but not claims for a breach of an express warranty. *Id.* at 728-729. As Barksdale demonstrates, the fact that a seller makes certain promises to a buyer at the time of a sale does not mean that the exclusion of warranties [**11] in an "as is" clause is meaningless. Instead, the phrase "as is" excludes all warranties *except* those expressly made to the buyer.

[*P20] In its motion for summary judgment, Land Rover exclusively argued that the contract was an "as is" contract negating all warranties. Perkins counters this argument by claiming that Land Rover promised to fix the air conditioning as a part of the sale, that it's repair was faulty, and that the faulty repair and other defects in the vehicle caused damage to the vehicle. Land Rover specifically agreed to fix the air conditioning in the sales contract as item three in the "optional equipment" section of the contract. Because of this promise, Land Rover expressly warranted that the air conditioning would be fixed. Any damage to the vehicle resulting from a faulty repair would not be precluded by the "as is" exclusion of warranties. Accordingly, Land Rover's argument that the "as is" language negated all warranties is meritless.

[*P21] Land Rover's motion for summary judgment did not raise an alternative argument of whether an express warranty was breached *if* that warranty was not negated by the "as is" language in the contract. "A party seeking summary judgment [**12] must specifically delineate the basis for which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond." Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, 116, 526 N.E.2d 798. A court cannot grant summary judgment on an issue not raised by the movant. *Id.* Since Land Rover's motion and the

evidence in support of that motion is silent regarding whether Land Rover breached its express warranty to repair the vehicle's air conditioning and whether a faulty repair may have caused the subsequent problems with the vehicle, this claim survives summary judgment. Perkins' argument in this regard is meritorious and his claim for a breach of an express warranty for the air conditioning is remanded for further proceedings.

[*P22] The same does not hold true for the remainder of Perkins' claims because he has produced no evidence of any other express warranty which could have caused the problems to the vehicle. Accordingly, Perkins is precluded from making a claim for any other defect in the vehicle.

Fraud

[*P23] Perkins' attempts to get around the existence of the "as is" terms within his contract by claiming that Land Rover fraudulently concealed certain information [**13] about the vehicle. He claims it would be obvious to any mechanic that the heads on the engine had been replaced a couple of times and that it was fraudulent for Land Rover not to inform him of this fact. Land Rover responds by arguing that Perkins has no evidence that it knew of problems with the engine's heads at the time of the sale.

[*P24] As discussed above, an "as is" clause in a contract places the risk on the buyer and generally relieves any duty the seller has to disclose. [*Rogers v. Hill* \(1998\), 124 Ohio App.3d 468, 471, 706 N.E.2d 438](#). But this does not mean a seller can commit fraud. *Id.* A person may fraudulently conceal a fact when that person has the duty to disclose that fact and that duty primarily arises in a situation involving a fiduciary or other similar relationship of trust and confidence. [*Fed. Mgt. Co. v. Coopers & Lybrand* \(2000\), 137 Ohio App. 3d 366, 383-384, 738 N.E.2d 842](#). The Ohio Supreme Court has stated that a used car dealer does have the duty to disclose certain facts, even when selling a vehicle "as is". "Where a used car dealer sells a vehicle 'as is' he is under a duty to use ordinary care to warn the purchaser of defects of which he has, or by the exercise [**14] of reasonable care, should have, knowledge." [*Stamper v. Parr-Ruckman Home Town Motor Sales, Inc.* \(1971\), 25 Ohio St.2d 1, 265 N.E.2d 785](#), syllabus.

[*P25] Perkins claims Land Rover had a duty to inform him of the repairs to the head and that it was fraudulent not to. But *Stamper* held that a dealer only needs to tell a purchaser of *defects* in the car. In his deposition testimony, Perkins admitted that there was not and is not a problem with the heads which were on the vehicle at the time of the sale. He complains about them now because they had been changed in the past, assumes

"they had to be changed for a reason," and supposes that reason must be related to the problems he subsequently had with the vehicle. Since the heads on the vehicle are not defective, it does not appear Land Rover had a duty to tell Perkins they had been repaired.

[*P26] Perkins' claims that Land Rover should have known of other defects, such as the allegedly faulty air suspension, at the time of the sale and should have warned him about them. For instance, he claims there were problems with the cruise control, the stereo, the coolant sensor, and the air suspension and he claims Land Rover should have known about [**15] these problems. But he has no evidence supporting his allegation that Land Rover should have known of these defects other than his own conjecture. For example, he claimed Land Rover should have known about the alleged defect in the air suspension since, "they sell [those vehicles] and fix [those vehicles] and repair [those vehicles] and should know about [the air suspension problem]." But he presents this court with nothing beyond that mere allegation.

[*P27] Basically, the only evidence that Perkins presents that would demonstrate that Land Rover knew or should have known of defects in the vehicle is that it was in the business of selling that type of vehicle and that the vehicle had problems after the purchase. Land Rover points to the "as is" clause in the sales contract to shield itself from Perkins' fraud claims. But Perkins has presented nothing showing that Land Rover had a duty to tell him of these defects. Accordingly, Perkins has failed to meet his reciprocal burden of specificity by pointing to facts in the record which demonstrate a genuine issue of fact. The trial court properly granted summary judgment to Land Rover on these claims and Perkins' arguments to the contrary [**16] are meritless.

[*P28] In conclusion, the trial court erred when it granted summary judgment to Land Rover on Perkins' claim for breach of an express warranty since Land Rover did not meet its burden on summary judgment to introduce evidence that it did not breach its express warranty to fix the air conditioning in the vehicle. But it properly granted summary judgment on Perkins' claim for fraud since Perkins presents no evidence that Land Rover knew or should have known of the alleged defects the vehicle had at the time of sale.

[*P29] Accordingly, the decision of the trial court is affirmed in part, reversed in part and this cause is remanded for further proceedings regarding Perkins' claim for breach of the express warranty covering the air conditioning repair.

Waite, P.J., and Vukvovich, J., concur.

LEXSEE

WENDELL PHILLIPS, Plaintiff, vs. DAKTRONICS, INC., Defendant.

Case No. 07-CV-14662

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
MICHIGAN, SOUTHERN DIVISION**

2008 U.S. Dist. LEXIS 8178

**February 5, 2008, Decided
February 5, 2008, Filed**

SUBSEQUENT HISTORY: Reconsideration denied by [Phillips v. Daktronics, Inc., 2009 U.S. Dist. LEXIS 39551 \(E.D. Mich., May 11, 2009\)](#)

COUNSEL: [*1] For Wendell Phillips, Plaintiff: Michael R. Kutas, LEAD ATTORNEY, Charlotte, MI.

For Daktronics, Incorporated, Defendant: Leo J. Gibson, Barris, Sott, Detroit, MI.

JUDGES: HON. GEORGE CARAM STEEH, UNITED STATES DISTRICT JUDGE.

OPINION BY: GEORGE CARAM STEEH

OPINION

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Defendant Daktronics designs and manufactures electronic scoreboards, programmable display systems and large screen video displays, many of which are used in athletic events. Many basketball leagues impose a rule that a team on offense must shoot the ball within a certain time, or else turn the ball over to the other team. A shot clock is used to count down and display the remaining time.

Plaintiff, Wendell Phillips, contends that in the early 1990s he invented a device incorporating LED lights around the perimeter of an acrylic basketball backboard and hoop. At the expiration of a mountable shot clock, the LED lights would light, thereby signifying the end of a shooting period. In early 1997, a series of telephone conversations allegedly took place between plaintiff and agents of defendant Daktronics, Inc.

A first meeting between the parties allegedly took place in March of 1997, and a second meeting occurred [*2] in April, 2007. During the second meeting plaintiff claims that the parties agreed that plaintiff would provide certain information, notes, drawings, technical specifications, and other documents relating to plaintiff's invention in exchange for the promise of a lump sum payment, royalty payments based upon sales of the device, and a promise to employ plaintiff as a consultant on the project to produce his device. (Complaint P 13-15). Plaintiff contends that he did turn over the agreed upon information during the April 1997 meeting. (Complaint P 16).

Plaintiff alleges that he repeatedly wrote to and phoned defendant in May of 1997 "to discuss the relationship entered into at the meeting" Defendant did not respond to these letters or phone calls. (Complaint P 17). In November 2004, plaintiff noticed a device being used at The Palace of Auburn Hills that resembled his LED lighted backboard invention. Plaintiff was told that the device was produced, sold and installed by defendant. Plaintiff contacted defendant in December of 2004, at which time defendant purportedly refused to honor its obligations to plaintiff. Plaintiff filed this lawsuit on October 31, 2007, alleging breach [*3] of oral contract, breach of implied contract, breach of fiduciary duty, unjust enrichment, fraud, fraud in the inducement, constructive fraud and negligent misrepresentation.

Defendant filed this motion to dismiss on the basis that each of the claims in plaintiff's complaint are barred by the relevant statutes of limitations.

STANDARD FOR DISMISSAL PURSUANT TO [RULE 12\(b\)\(6\)](#)

[Federal Rule of Civil Procedure 12\(b\)\(6\)](#) authorizes the Court to dismiss any complaint that fails "to state a claim upon which relief can be granted." The Court will dismiss a cause of action "for failure to state a claim" if "plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 \(1957\).](#)

ANALYSIS

Michigan's statutes of limitations apply to plaintiff's claims in this diversity action. Each cause of action plead by plaintiff will be analyzed below.

I. Breach of Oral Contract and Breach of Implied Contract

A cause of action for breach of contract must be brought within six years after the claim accrues. [MCL 600.5807\(8\)](#). A breach of contract claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when [*4] damage results", [Scherer v. Hellstrom, 270 Mich. App. 458, 463, 716 N.W.2d 307 \(2006\)](#), and without regard to when the breach is discovered. [H.J. Tucker & Assocs., Inc. v. Allied Chucker & Engineering Co., 234 Mich. App. 550, 562, 595 N.W.2d 176 \(1999\).](#)

In this case, plaintiff alleges that in May 1997, defendant did not respond to his "repeated written and telephonic attempts . . . to discuss the relationship entered into at the meeting" At oral argument, plaintiff's counsel expanded upon the allegations in the complaint by explaining that his client's attempts to contact defendant continued for a time after May 1997 before they ultimately dwindled and ended entirely. Thus, assuming a contract existed, the breach occurred by the summer of 1997.

Plaintiff argues that where performance by one party is dependent upon the occurrence or completion of some condition precedent, "the cause of action does not accrue until the condition is fulfilled *and* the promise is not performed." [Scherer v. Hellstrom, 270 Mich. App. 458, 464, 716 N.W.2d 307 \(2006\)](#) (citation omitted). According to plaintiff, the agreement required further action by defendant before its obligation under the contract would arise. For example, any lump sum payment made [*5] by defendant would be based upon an estimated value of the information provided by plaintiff. Further, any royalty payments were to be paid based upon future sales of products, and defendant's promise of employment was anticipated to be in relation to the commencement of manufacturing of plaintiff's invention.

However, plaintiff's complaint alleges that the contract was breached because defendant failed to make

the purported "initial lump sum payment" and refused to "respond to repeated written and telephonic attempts of Plaintiff to discuss the relationship entered into at the meeting in or about May of 1997." All of this conduct occurred in or around May, 1997. Therefore, because plaintiff's contract claims were not brought by May, 2003, they are time-barred.

II. Breach of Fiduciary Duty

A breach of fiduciary duty is a tort cause of action, and is governed by the three-year statute of limitations under Michigan law. [Miller v. Magline, Inc., 76 Mich. App. 284, 256 N.W.2d 761 \(1977\)](#). The period of limitations for a breach of fiduciary duty claim begins to run when "the fiduciary relationship ends - that is, [when] all the fiduciary's duties have been discharged or repudiated." [Carpenter v. Mumby, 86 Mich. App. 739, 750-51, 273 N.W.2d 605 \(1978\)](#). [*6] "A claim of breach of fiduciary duty . . . accrues when the beneficiary knew or should have known of the breach." [Bay Mills Indian Cmty. v. People, 244 Mich. App. 739, 751, 626 N.W.2d 169 \(2001\).](#)

Plaintiff arguably had actual knowledge of the alleged breach when defendant stopped communicating with plaintiff and did not make the "initial lump sum payment" allegedly due. At the very least, plaintiff "should have known of the breach" in or about May, 1997.

In 2007, the Michigan Supreme Court abolished the common law "discovery rule" as a limit on the application of the Michigan statutes of limitations. [Trentadue v. Gorton, 479 Mich. 378, 388-89, 738 N.W.2d 664 \(2007\)](#). In this case, plaintiff knew enough to allege a cause of action for breach of fiduciary duty against defendant by the summer of 1997. Plaintiff's fiduciary duty claim is time-barred.

III. Unjust Enrichment

A claim for unjust enrichment is governed by a three year statute of limitations because the contract is implied in law. [Martin v. East Lansing School Dist., 193 Mich. App. 166, 177, 483 N.W.2d 656 \(1992\)](#). The elements of an unjust enrichment claim are 1) that the plaintiff confer a benefit (2) that it would be unjust for the defendant to retain. [Dumas v. Auto Club Ins. Ass'n., 437 Mich. 521, 546, 473 N.W.2d 652 \(1991\)](#). [*7] Plaintiff allegedly conferred a benefit to defendant in April of 1997. Shortly thereafter, defendant allegedly rebuffed plaintiff's efforts to make contact, and refused to make an "initial lump sum payment." The fact that plaintiff made a formal demand in December 2004 does not impact the accrual of the cause of action for unjust enrichment.

In Comer Holdings Ltd. v. Rich Coast Inc., 1999 U.S. Dist. LEXIS 617 (E.D. Mich., Jan. 22, 1999), the court found that the statute of limitations began to run when plaintiff demanded payment from defendant. However, that case is distinguishable because Comer Holdings involved the question of whether a payment was made to satisfy an antecedent debt, or as consideration for a new loan. It only became unjust enrichment for the defendant to retain the payment following the demand because until then, the defendant viewed the payment as being on account of an antecedent debt. Id. at *8-9.

Plaintiff's claim of unjust enrichment is barred by the three year statute of limitations.

IV. Fraud in the Inducement, Constructive Fraud, Negligent Misrepresentation

Under Michigan law, a fraud or misrepresentation claim is governed by a six year statute of limitations. [*8] MCL 600.5813. "[T]he discovery rule does not apply to cases alleging fraud." Comerica Bank v. Papa, 2006 U.S. Dist. LEXIS 92269, *25 (E.D. Mich., Dec. 21, 2006) (citation omitted). The statute of limitations for fraud claims runs from the date of the fraudulent act. Moross Ltd. Partnership v. Eckenstein Capital, Inc., 466 F.3d 508, 518 (6th Cir. 2006).

In this case, plaintiff claims that defendant engaged in fraud and made misrepresentations during an April, 1997 meeting by allegedly promising plaintiff future payments and employment. The allegedly fraudulent acts occurred in April of 1997. Plaintiff attempts to invoke the theory of equitable estoppel in order to toll the running of the statute of limitations. For equitable estoppel to apply, a plaintiff must allege action by a

defendant "such as concealment of a cause of action, misrepresentation as the time in which an action may be brought, or inducement to refrain from bringing a cause of action." Compton v. Michigan Millers Mutual Insurance Co., 150 Mich. App. 454, 458, 389 N.W.2d 111 (1986). Plaintiff alleges that defendant in this case purposefully avoided contact with him until such a significant time had elapsed from the time of defendant's [*9] wrongful conduct so that defendant could avail itself of the applicable statute of limitations.

However, MCL 600.5855 provides that a fraudulently concealed cause of action must be commenced within 2 years after it is, or should have been, discovered. Plaintiff acknowledges that he discovered his cause of action in December, 2004. If defendant did fraudulently conceal plaintiff's causes of action, the latest plaintiff could have brought suit was December, 2006.

Plaintiff's fraud-based causes of action are time-barred under the statute of limitations applicable in this case.

CONCLUSION

For the reasons stated in this opinion, plaintiff's claims are all time-barred by the applicable statute of limitations. Defendant's motion to dismiss is GRANTED in its entirety.

s/ George Caram Steeh

GEORGE CARAM STEEH

UNITED STATES DISTRICT JUDGE

Dated: February 5, 2008

LEXSEE

**PIRELLI ARMSTRONG TIRE CORPORATION, RETIREE MEDICAL
BENEFITS TRUST individually and on behalf of others similarly situated,
Plaintiffs, v. WALGREEN CO., Defendant.**

Case No. 09 C 2046

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION**

2009 U.S. Dist. LEXIS 77648

**August 31, 2009, Decided
August 31, 2009, Filed**

SUBSEQUENT HISTORY: Count dismissed at [Pirelli
Armstrong Tire Corp. v. Walgreen Co., 2010 U.S. Dist.
LEXIS 13908 \(N.D. Ill., Feb. 18, 2010\)](#)

COUNSEL: [*1] For Pirelli Armstrong Tire Corporation Retiree Medical Benefits Trust, individually and on behalf of others similarly situated, Plaintiff: Anthony F. Fata, LEAD ATTORNEY, Dominic J. Rizzi, Patrick Edward Cafferty, Cafferty Faucher LLP, Chicago, IL; George E. Barrett, Gerald Edward Martin, PRO HAC VICE, Barrett, Johnston & Parsley, Nashville, TN; Jennifer Fountain Connolly, Kenneth A. Wexler, Sedef Melisa Twomey, Wexler Wallace LLP, Chicago, IL.

For Walgreen Company, Defendant: Robert M. Andelman, LEAD ATTORNEY, Emily R. Haus, Loeb & Loeb LLP, Chicago, IL.

JUDGES: Virginia M. Kendall, United States District Judge.

OPINION BY: Virginia M. Kendall

OPINION

MEMORANDUM OPINION & ORDER

Plaintiff Pirelli Armstrong Tire Corporation, Retiree Medical Benefits Trust ("Pirelli") filed suit against Defendant Walgreen Company ("Walgreens") individually and on behalf of all others similarly situated, alleging unjust enrichment (Count I) and violation of thirty-five (35) state consumer protection statutes (Count II). Pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), Walgreens moves this Court to dismiss Pirelli's Complaint for failure to state a claim upon which relief

can be granted. For the reasons stated below Walgreens' Motion [*2] to Dismiss is granted.

FACTS

The following facts are taken from the allegations in the Plaintiff's Complaint, which are accepted as true for the purpose of deciding this Motion to Dismiss. Pirelli, a voluntary employee benefits association maintained pursuant to the federal Employment Retirement Security Act, [29 U.S.C. §§ 1132, et seq.](#), provides health and medical benefits to participants and their beneficiaries. Compl. P 5. Walgreens operates approximately 7,000 retail pharmacies in forty-nine (49) states, the District of Columbia, and Puerto Rico. Compl. P 6. As a third-party payor ("TPP"), Pirelli reimburses pharmacies such as Walgreens for prescription drugs purchased by plan participants and their beneficiaries. Compl. P 1. Pirelli alleges that Walgreens engaged in an unlawful scheme to overcharge TPPs when dispensing generic versions of three brand-name drugs: (1) ranitidine HCl ("ranitidine"); (2) fluoxetine hydrochloride ("fluoxetine"); and (3) selegiline hydrochloride ("selegiline"). *Id.*

The alleged scheme revolved around the price differential between generic drugs in tablet and capsule form. *Id.* When a generic drug is found to be bioequivalent to the brand-name drug, the FDA [*3] assigns it an "AB" rating, and it can be used interchangeably with the brand-name drug. Compl. PP 8, 10. Although pharmacists can substitute an AB-rated generic for a brand-name drug absent a dispense as written order in the prescription, because of the differences in form and administration schedules between capsules and tablets, they may not substitute a capsule version of a drug with the tablet form, or vice

versa. Compl. P 11. As part of the alleged scheme, between July 1, 2001 and 2005, Walgreens would fill prescriptions written for the drugs in tablet form with the more expensive capsule form, and vice versa, and as a result of these substitutions, Pirelli and other TPPs reimbursed Walgreens two to four times more than they would have had the prescriptions been filled as written. Compl. P 1.

This reimbursement rate is the primary source of dispute between Pirelli and Walgreens. Individuals with private insurance through a TPP such as Pirelli only pay a flat percentage or "co-pay" when purchasing prescription drugs, and the remainder is paid by the TPP. Compl. P 12. While pharmacies determine what price they charge insured customers, the reimbursement rate is generally established [*4] by pharmacy benefit managers ("PBMs") acting on behalf of TPPs. Compl. P 13. The reimbursement rate almost universally consists of the ingredient cost portion and the dispensing fee. Compl. P 14. The ingredient cost for most generic drugs is based on a Maximum Allowable Cost ("MAC") that is determined by a TPP or PBM as the most they will reimburse the pharmacy for that drug. Compl. P 15. The MAC is determined by gathering the prices of each manufacturer's version of a generic drug and using a formula based on Average Wholesale Price ("AWP"). Compl. P 17. The AWP, published by drug manufacturers, is the standard benchmark for reimbursement of brand-name drugs, but it is only used to determine the reimbursement rate of generic drugs when there is no MAC price available. *Id.* Pharmacies tend to earn greater profits selling generic drugs that are priced based on AWP as opposed to those subject to MAC limitations. Compl. P 18.

During the relevant period, Pirelli's PBM established the reimbursement rate for generic drugs at AWP-14% plus a \$ 2.50 dispensing fee or MAC plus a \$ 2.50 dispensing fee, whichever was applicable, for certain plan beneficiaries, and AWP-35% plus a \$ 1.90 dispensing [*5] fee or MAC plus a \$ 1.90 dispensing fee, whichever was applicable, for other plan beneficiaries. Compl. P 20. Of the three drugs in question, ranitidine and selegiline are generally manufactured and marketed in tablet form, while fluoxetine is generally manufactured and marketed in capsule form. Compl. PP 21, 23, 25. Because ranitidine and selegiline capsules and fluoxetine tablets were produced by so few manufacturers and rarely prescribed, MACs were not adopted for these drugs in those respective forms. Compl. PP 22, 24, 26. Absent a MAC, reimbursement for the drugs in these forms generally involves the application of an AWP-based formula, resulting in a higher reimbursement rate. *Id.*

Citing to information revealed by a former Walgreens pharmacist in a previous *qui tam* suit, Pirelli alleges that it was Walgreens corporate policy to systematically change prescriptions written for dosage forms that were subject to MAC reimbursement limits, enabling Walgreens to evade the MACs and take advantage of the pricing differential between the tablet and capsule forms. Compl. P 28. Pirelli claims that Walgreens pharmaceutical distribution system was set up so that it was difficult to fill prescriptions [*6] in dosage forms that were subject to MACs. Compl. P 29. In support of its allegation, Pirelli cites to testimony by the former Walgreens pharmacist in the *qui tam* suit which claims that: 1) Walgreens personnel could not process orders for ranitidine tablets as written but instead filled the prescriptions with capsules; 2) Walgreens pharmaceutical dispensing computer system allowed pharmacists to switch dosage forms and they regularly did so when refilling prescriptions for ranitidine tablets, and; 3) they did this without obtaining the legally required physician's authorization. *Id.*

Pirelli claims that on several occasions Walgreens was reimbursed by Pirelli for the more expensive dosage form when the less expensive form was available. Compl. P 34. A single patient's prescription history from November 2001 to May 2005 shows that the average reimbursement rate charged by Walgreens for ranitidine was \$ 62.11 more than what Pirelli paid to other pharmacies. *Id.* While the reimbursement rate paid by Pirelli to Walgreens was substantially higher for ranitidine, the individual patient's co-payment remained constant, ranging from \$ 8-\$ 10 during the period in question. *Id.* On June 4, 2008, [*7] the *qui tam* proceeding was unsealed and Pirelli learned of Walgreens practice of switching dosage forms. Comp. P 35. Ten months later Pirelli brought these claims against Walgreens.

STANDARD OF REVIEW

When considering a motion to dismiss under [Rule 12\(b\)\(6\)](#), a court must accept as true all facts alleged in the complaint and construe all reasonable inferences in favor of the plaintiff. See [Murphy v. Walker](#), 51 F.3d 714, 717 (7th Cir. 1995). To state a claim upon which relief can be granted, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." [Fed. R. Civ. P. 8\(a\)\(2\)](#). A plaintiff need not allege all facts involved in the claim. See [Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.](#), 40 F.3d 247, 251 (7th Cir. 1994). However, in order to survive a motion to dismiss for failure to state a claim, the claim must be supported by facts that, if taken as true, at least plausibly suggest that the plaintiff is entitled to relief. See [Bell Atlantic Corp. v. Twombly](#), 550 U.S.

[544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 \(2007\)](#). Such a set of facts must "raise a reasonable expectation that discovery will reveal evidence" of illegality. [Id. at 1965](#).

DISCUSSION

As an initial [*8] matter, both parties devote substantial analysis to the viability of a nationwide class action alleging consumer fraud. The putative class, all similarly situated TPPs who had beneficiaries fill prescriptions at Walgreens (Compl. P 38), presents serious potential problems of manageability and conflict between the various states' consumer protection statutes. Nonetheless, it is premature to engage in this analysis at the motion to dismiss stage, before Pirelli has even moved for class certification. *See e.g., Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (highlighting the differing standard and factors considered for a Rule 23 motion as opposed to a Rule 12 motion); *Walker v. County of Cook*, 05 C 5634, 2006 U.S. Dist. LEXIS 52532, 2006 WL 2161829, at *2 (N.D. Ill. July 28, 2006) (holding that issues regarding commonality and typicality required under Rule 23 were prematurely raised in a 12(b)(6) motion); *Oxman v. WLS-TV*, 595 F. Supp. 557, 561-62 (N.D. Ill. 1984) (holding that motion to dismiss was premature considering the early stage of the litigation and suggesting that the same issues would be better raised in a motion opposing class certification).

I. Lack of Particularity in Pleading

Walgreens [*9] moves to dismiss Pirelli's consumer fraud claim (Count II) asserting that Pirelli's Complaint fails to meet the heightened pleading requirements of [Fed. R. Civ. P. 9\(b\)](#). Pirelli's Complaint alleges that Walgreens violated the consumer protection statutes of thirty-five (35) different states by filling prescriptions written for the various drugs in capsule or tablet form with dosages in the alternate form. Compl. P 49.

As an initial matter, while Pirelli's Complaint asserts that Walgreens violated thirty-five separate consumer protection statutes, Pirelli's allegations are so sparse with respect to where the specific fraudulent conduct occurred and where it personally suffered injury that the Court cannot even determine which state consumer protection statute to use in analyzing whether Pirelli has stated a claim for consumer fraud. *See Avery v. State Farm Mut. Auto Ins. Co.*, 216 Ill. 2d 100, 835 N.E. 2d 801, 853-54, 296 Ill. Dec. 448 (Ill. 2005) (establishing choice-of-law rule based on where transactions "occur primarily and substantially"); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002) (in a consumer fraud case, "the injury is decided where the consumer is located."). In their submissions [*10] to the Court, both

Walgreens and Pirelli have argued only Illinois substantive law and therefore for purposes of this motion to dismiss the Court will address Pirelli's consumer fraud claim under the Illinois Consumer Fraud Act. *See American Home Assur. Co. v. Stone*, 61 F.3d 1321, 1324 (7th Cir. 1995) (applying Illinois law where neither party made a choice of law argument and argued only Illinois law in their submissions to the trial court); *Vega v. Contract Cleaning Maint., Inc.*, 03 C 9130, 2004 U.S. Dist. LEXIS 20949, 2004 WL 2358274, at *4 n. 3 (N.D. Ill. Oct. 18, 2004) (St. Eve, J.) (same).

To state a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") Pirelli must allege: 1) a deceptive act or practice by Walgreens; 2) Walgreens' intent that Pirelli rely on the deception; 3) that the deception occurred in the course of conduct of trade or commerce; 4) actual damage to Pirelli; and 5) that the damage was proximately caused by Walgreens. *See Cozzi Iron & Metal, Inc. v. United States Office Equip.*, 250 F.3d 570, 575-76 (7th Cir. 2005); *Gredell v. Wyeth Labs, Inc.*, 367 Ill. App. 3d 287, 854 N.E.2d 752, 756, 305 Ill. Dec. 160 (Ill. App. Ct. 2006). A complaint alleging a violation of the ICFA must be pleaded with the [*11] same particularity as common law fraud and must meet the heightened pleading standard of [Federal Rule of Civil Procedure 9\(b\)](#). *See Fed. R. Civ. Proc. 9(b)* (In alleging fraud...a party must state with particularity the circumstances constituting fraud . . .); *see also Davis v. G.N. Mortgage Corp.*, 396 F.3d 869, 883 (7th Cir. 2005) (consumer fraud claims must be pleaded with the same level of specificity required by [Rule 9\(b\)](#)); *IWOI, LLC v. Monaco Coach Corp.*, 581 F. Supp. 2d 994, 1002 (N.D. Ill. 2008) (same); *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 675 N.E.2d 584, 593, 221 Ill. Dec. 389 (Ill. 1996) (same).¹ This heightened standard requires that Pirelli allege the identity of the person making the representation, the time, place and contents of the misrepresentation, and the method by which the misrepresentation was communicated. *See DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) (describing [Rule 9\(b\)](#) particularity as "the who, what, when, where, and how: the first paragraph of any newspaper story."); *see also IWOI*, 581 F. Supp. 2d at 1002.²

¹ The Tennessee Consumer Protection Act, [Tenn. Code § 47-18-101, et seq.](#), the only other consumer protection statute mentioned by either party in their submissions [*12] to the Court, also requires that claims brought under the Act meet the heightened standards of [Fed. R. Civ. Proc. 9\(b\)](#). *See Metropolitan Casualty & Ins. Co. v. Bell*, 04-5965, 2005 U.S. App. LEXIS 17825, 2005 WL 1993446, at *5 (6th Cir. Aug. 17, 2005)

citing Harvey v. Ford Motor Credit Co., 8 S.W.3d 273, 275 (Tenn. App. Ct. 1995).

2 While the 7th Circuit has recently departed from requiring all claims under the ICFA to meet Rule 9(b)'s heightened pleading standards, it has only done so for claims of unfair business practices; claims sounding in fraud or deception are still required to meet the heightened pleading requirements of Rule 9(b). See Windy City Metal Fabricators & Supply, Inc. v. CIT Technical Financing, 536 F.3d 663, 670 (7th Cir. 2008).

Pirelli's Complaint fails to meet specificity requirement of Rule 9(b). The allegations in Pirelli's Complaint are derived primarily from the information disclosed in the *qui tam* proceeding, *United States of America ex rel. Bernard Lisitza v. Walgreen Co.* No. 03-C-00744 (N.D. Ill.). Compl. P 29. While relying on allegations contained in the previous *qui tam* case against Walgreens helps to establish the foundation for Pirelli's argument that Walgreens had a corporate [*13] policy of switching dosage forms, it provides no details to substantiate Pirelli's claim that it was defrauded by Walgreens.

Pirelli's claim that it has met the heightened standard through the excessive detail it provided regarding: 1) the differences in pricing and effect between drugs in tablet and capsule form; 2) the derivation of and differences between MACs and AWP's and; 3) the complex relationship between TPPs, PBMs and pharmacies that govern the reimbursement of prescription drugs, is similarly misguided. Pl. Resp. 9; Compl. PP 7-32. This information only provides a helpful backdrop against which Pirelli could make specific allegations regarding Walgreens' fraudulent conduct. Pirelli's Complaint completely lacks any details regarding Walgreens' fraudulent conduct toward Pirelli and fails to identify even one specific fraudulent transaction at a specific Walgreens location involving an identified Walgreens employee. Because Pirelli's Complaint fails to specify almost any of the 'who, what, where, when, and how' requirements, it does not satisfy Rule 9(b)'s heightened pleading requirement and therefore fails to state a claim against Walgreens for consumer fraud.

To begin, Pirelli [*14] does not identify any individual who made a misrepresentation of or concealed a material fact, instead alleging merely that Walgreens, as a company, adopted a corporate policy of switching prescriptions with dosage forms that were not subject to MAC limitations. Pirelli's failure to identify the specific individual(s) that misrepresented or concealed the fact that Walgreens switched dosage forms precludes its Complaint from satisfying the heightened pleading requirements of Rule 9(b). See U.S. v. All Meat and Poultry Products Stored at Lagrou Cold Storage, 470 F.

Supp. 2d 823, 830 (N.D. Ill. 2007) (dismissing ICFA claim for failing to identify specific individual that made allegedly fraudulent statement).

Pirelli's allegations as to the time, place and contents of Walgreens' allegedly fraudulent activity are similarly bare-boned. Although Pirelli alleges the content of the fraud, the switching of dosage forms on multiple occasions, its Complaint is nearly devoid of any specific allegations of the time and place of the fraudulent activity. Pirelli identifies the relevant time period as July 1, 2001 to 2005. Compl. P 28. While the Court does not read Rule 9(b) to require the provision [*15] of exact dates, giving such a vague time frame is insufficient to adequately plead when the allegedly fraudulent activity took place. The lack of specificity in Pirelli's Complaint is even more striking with regards to the place of the fraudulent activity. In the process of alleging violations of thirty-five different consumer protection statutes, Pirelli fails to include even a single location where any of these statutes were violated. The only specific location mentioned is Walgreens' corporate headquarters in Deerfield, Illinois, where the corporate policy was allegedly hatched. Compl. PP 6, 28. Without alleging that any transactions actually occurred in Illinois, however, Pirelli's claim that a fraudulent scheme originated at a corporate headquarters in Illinois is insufficient to bring Pirelli, an out-of-state resident, within the ambit of the ICFA. See Avery, 835 N.E.2d at 855 (finding claim by non-Illinois resident that a scheme 'disseminated' from a corporate headquarters in Illinois insufficient to allow plaintiff to bring a claim under the ICFA). Moreover, without alleging where any of the allegedly fraudulent transactions took place, it is impossible to know where Pirelli [*16] was actually injured.

The lone example offered by Pirelli of the dosage-form switching employed by Walgreens fails to remedy this defect. While it does show that Pirelli paid a higher reimbursement rate when an anonymous Pirelli beneficiary filled prescriptions at Walgreens, it does not specify where--what state or specific Walgreens--these higher reimbursement rates were paid, what Walgreens representative(s) engaged in these transactions, or the method by which these transactions occurred. Pirelli's Complaint utterly fails to put Walgreens on notice of the specific allegations with which it is confronted. Because Pirelli has failed to plead with specificity the who, what, where, when and how, it has failed to state a claim against Walgreens for consumer fraud and therefore Count II of its Complaint is dismissed.

II. Tolling of the Statute of Limitations

Walgreens also moves to dismiss Pirelli's thirty-five states' consumer fraud act violations as time-barred under

the ICFA's statute of limitations period. In support of its contention that all of Pirelli's consumer fraud act violations are subject to Illinois' statute of limitations period, Walgreens asserts that the statute of limitations [*17] is procedural under Illinois choice-of-law principles, and therefore the Illinois statute of limitations automatically applies. This argument, however, is incomplete. "A federal court sitting in diversity must follow the statute of limitations that the state in which it is sitting would use." *Thomas v. Guardsmark, Inc.*, 381 F.3d 701, 707 (7th Cir. 2004). In Illinois, such statutes are procedural in their nature and the Illinois' statute of limitations will usually apply. See *FDIC v. Wabick*, 335 F.3d 620, 627 (7th Cir. 2003). Where a cause of action is created by statute and a time is fixed within which the cause of action must be asserted, however, the law of the state where the action occurred must govern. See *Cox v. Kaufman*, 212 Ill. App. 3d 1056, 571 N.E. 2d 1011, 1015, 156 Ill. Dec. 1031 (Ill. App. Ct. 1991). In such circumstances, the limitations period is not merely procedural, but a fundamental component of the right itself. See *Kalmich v. Bruno*, 553 F.2d 549, 553 (7th Cir. 1977) ("[W]here (a) statute creates a right that did not exist at common law and restricts the time within which the right might be availed of, or otherwise imposes conditions, such statute is not a statute of limitation (in the normal sense) but [*18] the time element is an integral part of the enactment."). Therefore, without an exhaustive review of each of the thirty-five states' consumer fraud statutes to determine whether they contain a fixed time within which a cause of action must be asserted, the Court cannot determine whether or not the ICFA's statute of limitations applies to these claims. Furthermore, as stated above, because Pirelli's Complaint fails to allege where it suffered its injury or where the allegedly fraudulent transactions occurred, it has failed to allege a violation of any state's consumer protection act. Therefore, at this time it is premature for the Court to wade through thirty-five states' statutes, without any assistance from the parties, to determine the applicable statute of limitations period for each states' consumer protection act and whether Walgreens' claim under each act is time-barred. However, because the parties have addressed the ICFA's statute of limitations, which would apply to Pirelli's ICFA claim if he had satisfied [Rule 9\(b\)](#)'s pleading requirements, the Court will address Walgreens' statute of limitations argument with respect to this claim.

The ICFA provides that a plaintiff must bring [*19] a claim for violation of the act within three years of the date the cause of action accrues. See [815 ILCS 505/10a\(e\)](#). While the only allegedly fraudulent transactions mentioned Pirelli's Complaint occurred in 2002 and 2003, thereby placing Pirelli's claim well outside the statutory limit, Pirelli asserts that the statute

of limitations was tolled by the fact that Pirelli was unaware of Walgreens' scheme until the *qui tam* whistleblower proceeding was unsealed on June 4, 2008.

Pirelli cites the "discovery rule" used in Illinois in support of its argument that its claim is timely. Under the "discovery rule," a cause of action accrues when the plaintiff "knows or should know of his injury and knows or should know that it was wrongfully caused." See *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 441 (7th Cir. 1994) (citing *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 430 N.E.2d 976, 980, 58 Ill. Dec. 725 (Ill. 1981)). Walgreens asserts that Pirelli's possession of records, which they included in their Complaint, showing the differing prices and dosage forms dispensed at Walgreens demonstrates that they could have learned of the scheme well before the statute of limitations expired; however, Pirelli's mere possession [*20] of its payment records is not alone sufficient to start the statute of limitations. There must also be some suspicious circumstance that would alert Pirelli to Walgreens' potentially fraudulent conduct. See *Fujisawa Pharmaceutical Co., Ltd. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997) (while all pertinent documents were in plaintiff's possession, the court found that "more than bare access to necessary information is required to start the statute of limitations running. There must also be a suspicious circumstance to trigger a duty to exploit the access."). Furthermore, at this stage, the question is only whether there is *any* set of facts that if proven would establish a defense to the statute of limitations. See *Clark v. City of Braidwood*, 318 F.3d 764, 768 (7th Cir. 2003). Accepting Pirelli's claim that it does not track what it spends on individual drugs, but rather on overall drug costs, it is not unreasonable that it was unaware of the substantial pricing discrepancy until it learned of the *qui tam* suit against Walgreens which was unsealed on June 4, 2008. Therefore, assuming Walgreens can state a claim under the ICFA there is a set of facts that if proven can establish a defense [*21] to the statute of limitations period. See *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 421 N.E. 2d 864, 868-69, 52 Ill. Dec. 1 (Ill. 1981) (the question of when a party should have known of the existence of an injury to delay the commencement of the statute of limitations involves a fact inquiry). Therefore, Walgreens' motion to dismiss Pirelli's ICFA claim as time-barred is denied without prejudice.

III. Unjust Enrichment

Lastly, Pirelli brings a claim for unjust enrichment, seeking the establishment of a constructive trust that would consist of restitution in the amount of the reimbursement differential between the more expensive and less expensive dosage forms of ranitidine, fluoxetine, and selegiline (Count I). A claim of unjust enrichment

alone, however, is not sufficient to raise a cause of action to justify recovery, but rather it must rest upon some underlying fraudulent conduct or the breach of a fiduciary duty. See Charles Hester Enterprises, Inc. v. Illinois Founders Ins. Co., 137 Ill. App. 3d 84, 484 N.E.2d 349, 354, 91 Ill. Dec. 790 (Ill. App. Ct. 1985). As Pirelli has not claimed a fiduciary relationship with Walgreens, the only way it can proceed with a claim for unjust enrichment is by effectively claiming Walgreens engaged in fraudulent [*22] conduct. As stated above, Pirelli's Complaint fails to state a claim of fraud against Walgreens and therefore its claim for unjust enrichment must be dismissed. See e.g., Martis v. Grinnell Mut. Reinsurance Co., 388 Ill. App. 3d 1017, 905 N.E.2d 920, 928, 329 Ill. Dec. 82 (Ill. App. Ct. 2009) (upholding dismissal of unjust enrichment claim when trial court found that there was no underlying violation of the ICFA); Mulligan v. OVC, 382 Ill. App. 3d 620, 888 N.E.2d 1190, 1200, 321 Ill. Dec. 257 (Ill. App. Ct. 2008)

(upholding dismissal of unjust enrichment claim in the absence of a separate cause of action for consumer fraud).

CONCLUSION AND ORDER

For the reasons stated, Walgreens' Motion to Dismiss is granted. Counts I and II of Pirelli's Complaint are dismissed without prejudice for failure to state a claim. Pirelli is given fourteen days from the date of this Order to file an Amended Complaint.

So ordered.

/s/ Virginia M. Kendall

Virginia M. Kendall, United States District Judge

Northern District of Illinois

Date: August 31, 2009

LEXSEE

RADON SERVICE AGREEMENT CORP., Plaintiff, -vs- RADON SERVICE AGREEMENT, INC., et al., Defendants.

Case No. 3-:04-CV-370

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

2005 U.S. Dist. LEXIS 36562

**August 26, 2005, Decided
August 26, 2005, Filed**

COUNSEL: [*1] For Radon Service Agreement Corp, Plaintiff: Richard B Reiling, Richard Reiling, ESQ., Springboro, OH.

For Radon Service Agreement Inc, Radon Service Associates, Defendants: Frederick L Tolhurst, Cohen & Grigsby, Pittsburgh, PA; Morgan J Hanson, Richard A Ejzak, Cohen & Grigsby, P.C., Pittsburgh, PA US.

JUDGES: THOMAS M. ROSE, UNITED STATES DISTRICT JUDGE.

OPINION BY: THOMAS M. ROSE

OPINION

ENTRY AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (Doc. # 7)

This matter arises over a license agreement (the "Agreement") entered into by Plaintiff Radon Service Agreement Corporation ("RSA Corp.") with Defendant Radon Service Agreement, Inc. ("RSA"). The Agreement allegedly allows RSA to use certain intellectual property owned by RSA Corp. in exchange for certain payments. RSA allegedly assigned its rights in the Agreement to Defendant Radon Service Associates ("Services Associates").

RSA Corp. brings two causes of action under Ohio law against RSA and Services Associates (collectively the "Defendants"). The First Cause of Action is for breach of contract. The Second Cause of Action is for unjust enrichment.

Now before the Court is the Defendants' Motion To Dismiss brought pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#) [*2] . (Doc. # 7.) This Motion is now fully briefed and ripe for

decision. The standard of review for motions to dismiss will first be set forth followed by an analysis of Defendants' Motion.

STANDARD OF REVIEW

The purpose of a [Rule 12\(b\)\(6\)](#) motion to dismiss is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true. [Mayer v. Mylod](#), 988 F. 2d 635, 638 (6th Cir. 1993)(citing [Nishiyama v. Dickson County, Tennessee](#), 814 F.2d 277, 279 (6th Cir. 1987)). Put another way, "the purpose of a motion under Federal [Rule 12\(b\)\(6\)](#) is to test the formal sufficiency of the statement of the claim for relief; the motion is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case." 5B Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1356 (3d ed. 2004).

The test for dismissal under [Fed. R. Civ. P. 12\(b\)\(6\)](#) is a stringent one. "[A] complaint should not be dismissed for failure to state a claim on which relief can be granted unless [*3] it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [Hartford Fire Ins. Co. v. California](#), 509 U.S. 764, 811, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993) (quoting [Conley v. Gibson](#), 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). In addition, for purposes of the motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff and its allegations taken as true. [Scheuer v. Rhodes](#), 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974).

To survive a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#), "a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal

theory." Columbia Natural Resources, Inc. v. Tatum, 58 F. 3d 1101 (6th Cir. 1995), cert. denied, 516 U.S. 1158, 116 S. Ct. 1041, 134 L. Ed. 2d 189 (1996). The Court "need not accept as true legal conclusions or unwarranted factual inferences." Morgan v. Church's Fried Chicken, 829 F. 2d 10, 12 (6th Cir. 1987). Put another way, bare assertions of legal conclusions are not sufficient. Lillard v. Shelby County Bd. of Educ., 76 F. 3d 716, 726 (6th Cir. 1996). [*4] It is only well-pleaded facts which are construed liberally in favor of the party opposing the motion to dismiss. *Id.*; see also, Wright & Miller, *supra*, § 1357.

In this case, the Defendants' Motion To Dismiss is based upon application of the statute of limitations. When a complaint indicates that the relief requested therein is barred by the statute of limitations, the complaint is to be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Martinez v. Western Ohio Health Care Corp., 872 F.Supp. 469, 471 (S.D.Ohio 1994)(citing Kaiser Aluminum and Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045 (5th Cir. 1982), cert. denied, 459 U.S. 1105, 103 S. Ct. 729, 74 L. Ed. 2d 953 (1983)). The analysis next turns to Defendants' Motion.

MOTION TO DISMISS

RSA Corp. alleges that it is due certain quarterly royalty payments. The Defendants move to dismiss RSA Corp.'s Second Cause of Action for unjust enrichment to the extent that it seeks recovery for alleged royalty payments due before February 16, 1999, because these royalty payments are due beyond the statute of limitations. RSA Corp. responds that [*5] the "discovery rule" should be applied in this case and the statute of limitations on the royalty payments did not begin to run until 2004 when RSA Corp. discovered active concealment by the Defendants regarding the revenues of their company.

RSA Corp.'s Second Cause of Action is for unjust enrichment under Ohio law. A six-year statute of limitations applies to unjust enrichment claims in Ohio. Drozeck v. Lawyers Title Insurance Corp., 749 N.E.2d 775, 140 Ohio App. 3d 816, 823 (Ohio Ct. App. 2000). Therefore, a six-year statute of limitations applies to RSA Corp.'s Second Cause of Action for unjust enrichment.

Both parties agree that RSA Corp's unjust enrichment claim is, at least in part, for installment payments, in the form of quarterly royalty payments, allegedly due to RSA Corp. Because the right to sue on each installment accrues when the installment payment is due, the statute of limitations runs separately upon default of payment of each installment. Everhart v. State Life Insurance Co., 154 F.2d 347, 356 (6th Cir. 1946). Therefore, the statute of limitations is separate for each installment.

RSA Corp. argues that the "discovery rule" applies and the statute [*6] of limitations does not begin to run on the installments until the time when RSA Corp. "discovered" the active concealment by Defendants of their revenues. However, the "discovery rule" does not apply to unjust enrichment claims brought pursuant to Ohio law. Palm Beach Company v. Dun & Bradstreet, Inc., 106 Ohio App. 3d 167, 665 N.E.2d 718, 723 (Ohio Ct. App. 1995). In fact, "a cause of action for unjust enrichment accrues on the date that money is retained under circumstances where it would be unjust to do so." *Id.* Therefore, the statute of limitations on each royalty payment begins to run when the quarterly royalty payment was due.

SUMMARY

RSA Corp.'s Second Claim for Relief for unjust enrichment includes, at least in part, claims that certain installment payments, in the form of quarterly royalty payments, were due and not paid. A cause of action for unjust enrichment accrues on the date that money is due. Further, a six-year statute of limitations applies to unjust enrichment claims brought pursuant to Ohio law. Therefore, to the extent that RSA Corp.'s unjust enrichment claims regard installment payments and are brought more than six years beyond when the installment payments [*7] were due, they are barred by the statute of limitations and must be dismissed. The Defendants' Motion To Dismiss is, therefore, GRANTED regarding quarterly royalty payments due more than six years prior to when this action was filed.

DONE and **ORDERED** in Dayton, Ohio, this Twenty-Sixth day of August, 2005.

THOMAS M. ROSE

UNITED STATES DISTRICT JUDGE

LEXSEE

**THE REGENTS OF THE UNIVERSITY OF MICHIGAN, individually as Assignee
and Subrogee of Peggy Jordan and Michael Anthony Jordan, Deceased, Plaintiff, v.
OTIS SPUNKMEYER, INC, ET AL., Defendants.**

Case number 03-72985

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
MICHIGAN, SOUTHERN DIVISION**

2006 U.S. Dist. LEXIS 8476; 38 Employee Benefits Cas. (BNA) 1155

**March 6, 2006, Decided
March 6, 2006, Filed**

COUNSEL: [*1] For University of Michigan Regents, Individually and as Assignee and Subrogee of Peggy Jordan, and Michael Anthony Jordan, Deceased, Plaintiff: Michael R. Shpiece, Roger F. Wardle, Miller Shpiece, Southfield, MI.

For Otis Spunkmeyer, Incorporated, Otis Spunkmeyer, Incorporated Health Benefit Plan, Stephen A. Ricks, Defendants: Lisa K. Anderson, Secrest, Wardle, (Farmington Hills), Farmington, Hills, MI.

For Alta Health and Life Insurance Company, One Health Plan of Illinois, Incorporated, now known as Great-West Healthcare of Illinois, Incorporated, Defendants: Mark E. Straetmans, Berry, Moorman, Detroit, MI.

For Alta Health and Life Insurance Company, Alta Health and Life Insurance Company, Cross Claimants: Mark E. Straetmans, Berry, Moorman, Detroit, MI.

For Otis Spunkmeyer, Incorporated, Otis Spunkmeyer, Incorporated Health Benefit Plan, Stephen A. Ricks, Cross Defendants: Lisa K. Anderson, Secrest, Wardle, (Farmington Hills) Farmington, MI.

For Otis Spunkmeyer, Incorporated Health Benefit Paln, Stephen A. Ricks, Cross Claimants: Lisa K. Anderson, Secreast, Wardle, (Farmington Hills) Farmington Hills, MI.

For Alta Health and Life Insurance, One Health [*2] Plan of Illinois, Incorporated, Cross Defendants: Mark E. Straetmans, Berry, Moorman, Detroit, MI.

JUDGES: JULIAN ABELE COOK, JR., United States District Judge.

OPINION BY: JULIAN ABELE COOK, JR.

OPINION

ORDER

The Plaintiff, Regents of the University of Michigan, filed this action against the Defendants, Otis Spunkmeyer, Inc., Otis Spunkmeyer, Inc. Health Benefit Plan, Alta Health and Life Insurance Company, One Health Plan of Illinois, Inc., Gary Westrol, John Doe Insurance Company, and John Doe ERISA Benefit Plan ("Defendants"), to recover payments for the expenses that it incurred in connection with the medical care and treatment of Michael Anthony Jordan ("Baby Jordan").¹

1 This action was brought by the Plaintiff individually and as the assignee and subrogee of Baby Jordan and his mother, Peggy Jordan.

On July 1, 2005, one of the Defendants, Alta Health and Insurance Company ("Alta"), filed a motion, seeking the entry of a summary judgment in this matter. On August 12, 2005, two of the other Defendants, Otis [*3] Spunkmeyer, Inc. and Otis Spunkmeyer, Inc. Health Benefit Plan ("Spunkmeyer"), filed a "Notice of Joinder and Concurrence" in connection with Alta's currently pending dispositive motion.² For the reasons that have been set forth below, the Court now grants the Defendants' motion for summary judgment.

2 The Court determined that this motion should be decided on the briefs without the benefit of an oral argument pursuant to E.D. Mich. LR 7.1(e)(2),

I.

On February 5, 1999, Peggy Jordan gave birth to a son, Michael, at the University of Michigan Medical Center in Ann Arbor, Michigan. At the time, she was covered under a self-funded employee benefit plan that was sponsored by her employer, Otis Spunkmeyer, Inc., which served as the sponsor of the Spunkmeyer Health Benefit Plan, a health benefit plan as defined by the Employee Retirement Income Security Act of 1974 ("ERISA"), [29 U.S.C. § 1101](#) ("Plan"). During this period of time, Alta provided claims processing services and stop-loss insurance [*4] coverage for the Plan.

The eligibility of Baby Jordan to become a participant in the Plan was dependent upon him becoming an enrollee within 31 days of his birth. The Hospital was aware of this requirement, as evidenced by the following two excerpts from the Hospital's computer log.

02/05/99 99 F 93 NEWBORN NOT LISTED, PARENTS TO ADD IN 30 DAYS BILL SEPARATE INBORN NICU. RUTA

Baby Jordan, who was born with severe medical problems, received extensive medical treatment from the time of his birth until his death on April 24, 1999, the cost of which totaled nearly \$ 650,000. Following the demise of this young child, the Plaintiff submitted a claim for the reimbursement of those costs and expenses that it incurred in connection with his medical care and hospital treatment to the Defendants. This claim was subsequently denied. According to the Defendants, the rejection of this claim was due to Peggy Jordan's failure to officially add Baby Jordan's name to her medical coverage under the health plan. However, the Plaintiff asserts that the failure to "formally" enroll his name in the Plan was due only to a clerical oversight. An exchange of correspondence and personal conversations [*5] followed. However, when the parties were unable to resolve their differences, this lawsuit was initiated on August 4, 2003.

II.

In 1986, the Supreme Court opined that "one of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupportable claims or defenses" Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). At the same time, the language within Fed.R. Civ. P. 56(c) provides that a motion for summary judgment should be granted only if a party "shows that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Applying the Celotex standard to this case, the burden is on the Defendants to demonstrate the absence of a genuine issue of a material fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

In assessing this type of a dispositive motion, the Court must examine all pleadings, depositions, answers to interrogatories, admissions, and affidavits in a light that is most favorable to the Plaintiff as the non-moving party. Fed. R. Civ. P. 56(c); [*6] see United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); Boyd v. Ford Motor Co., 948 F.2d 283, 285 (6th Cir. 1991); Bender v. Southland Corp., 749 F.2d 1205, 1210-11 (6th Cir. 1984). It is not the role of this Court to weigh the facts. 60 Ivy Street Corp. v. Alexander, 822 F.2d 1432, 1435-36 (6th Cir. 1987). Rather, it is the duty of the Court to determine "whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson, 477 U.S. at 250.

A dispute is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. Hence, the Defendants can demonstrate the absence of a genuine factual issue if they are able to present evidence which is sufficient to make the issue "so one-sided that [they] must prevail as a matter of law," id. at 252, or point to a failure by the Plaintiff to present evidence that is "sufficient to establish the existence of an element essential to [*7] its case, and on which it will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Upon such a showing, the Plaintiff, as the non-moving party, must act affirmatively to avoid the entry of a summary judgment. Fed. R. Civ. P. 56(e). A mere scintilla of supporting evidence is insufficient. See Anderson, 477 U.S. at 252, quoted in Street v. J.C. Bradford & Co., 886 F.2d 1472, 1477 (6th Cir. 1989). Indeed, "if the evidence is merely colorable or is not significantly probative summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted).

III.

In the absence of a controlling statute to the contrary, a provision in a contract may validly limit the time for bringing an action if the period in which to do so is reasonable. Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 608, 67 S. Ct. 1355, 91 L. Ed. 1687 (1947). This general rule has been applied whenever an ERISA regulated employee welfare benefit plan contains a limitation on the time in which to initiate a lawsuit. Santino v. Provident Life & Accident Ins. Co., 276 F.3d 772 (6th Cir. 2001); [*8] Bomis v. Metropolitan Life Ins. Co., 970 F. Supp. 584 (E.D. Mich. 1988); Roberson v. Metropolitan Life Ins. Co., 682 F. Supp. 907 (E.D. Mich. 1988). Although the language within ERISA does not contain a statute of limitations for benefit claims, such matters are typically governed by the most analogous state law. Meade v. Pension Appeals & Review Committee, 966 F.2d 190, 195 (6th Cir. 1992).

In order to recover benefits under an employee welfare benefit plan, a claim must be filed within three years. There are courts within this Circuit that have declared a three year statute of limitations time period to be a reasonable restriction on the commencement of a lawsuit. [Bomis, 970 F. Supp. at 588-89](#); [Roberson, 682 F. Supp. at 909](#). However, an ERISA cause of action for health care benefits does not accrue until a claim has been formally made and denied. [Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund, 979 F.2d 444, 451 \(6th Cir. 1992\)](#).

Here, in order to receive health care benefits, the period of time for submitting a proof of loss claim to the Defendants was ninety days [*9] following the date of the loss. A "loss" occurs whenever an obligation to pay medical services becomes due. However, the Plan in this litigation places a one year limitation on the ability of a claimant to file for benefits with the Defendants after the proof of loss is due.

According to this analysis, the latest date upon which Peggy Jordan could have submitted a proof of loss would have been July 24, 1999 - ninety days after the infant's unfortunate demise. There is evidence in this case that the Plaintiff did submit its "proof of loss" claim to the Defendants within the requisite ninety day time frame. In keeping with this reasoning, the Plaintiff should have initiated this lawsuit within a period of three years from the date on which the "proof of loss" was submitted to the Defendants; namely, July 24, 2002. However, the Court notes with interest that the Defendants did not transmit a formal letter of denial to the Plaintiff until July 1, 2003 - nearly one year after above-listed filing "deadline." Approximately one month later (August 4, 2003), the Plaintiff commenced these legal proceedings, seeking appropriate relief.

Although, the present lawsuit should have been filed by [*10] July 2002, the cause of action did not arise until the Defendants forwarded their formal denial letter on July 1, 2003. Prior to that date, the Plaintiff was not aware of the Defendants' official position on its claim. As a consequence and contrary to the Defendants' argument on this issue, the Plaintiff's claim under Count I of the Complaint is not time barred.

The requirements of the Plan are delineated in the Group Explanation of Benefits booklet, as well as in the document which outlines its terms and conditions. According to the Plan, Baby Jordan became a dependant of Peggy Jordan on the date of his birth, February 5, 1999. In order to be covered under the Plan, it was necessary for this infant to be an official enrollee. The record in this cause indicates that he was not enrolled in the Plan at the time of his death. Thus, the Plaintiff's claim for benefits must necessarily fail because of its failure to satisfy the terms of the Plan.

IV.

In its Complaint, the Plaintiff asserts that the Defendants knew or should have known of Baby Jordan's birth and subsequent serious medical problems. The Plaintiff also maintains that the Defendants had an obligation to notify Peggy Jordan [*11] of the enrollment procedure, and by failing to do so, they violated their fiduciary duties to her. The Defendants posit that even if the Plaintiff's claim is not time barred according to the limitation period within the Plan, it is precluded by [Mich. Comp. Laws § 600.5805\(10\)](#)(2005) which, in essence, requires a claimant to initiate a lawsuit within three years from the date of the alleged loss.

However, under Michigan state law, a statute of limitations defense is ineffectual against governmental entities if the claim is "for the recovery of the cost of maintenance, care, and treatment of persons in hospitals" [Mich. Comp. Laws § 600.5821\(4\)](#). According to the law in Michigan, the Plaintiff is considered to be a political subdivision of the State, and, thus, it is a governmental entity for the purpose of this litigation. *Id.* Inasmuch as this lawsuit is an action for the recovery of the cost of care and treatment of Baby Jordan from a governmental entity, the Defendants' contention that the Plaintiff's claim is time barred must be rejected. [Regents v. State Farm Mutual Ins. Co., 250 Mich. App. 719, 732, 650 N.W.2d 129 \(Mich. Ct. App. 2002\)](#). [*12] Therefore, inasmuch as the Plaintiff is a governmental entity and the claim is "for the recovery of the cost of maintenance, care, and treatment of persons in hospitals," its claim for a breach of a fiduciary duty is not time barred.

V.

If a statute expressly provides for a particular remedy or remedies, a court should be reluctant to read other remedial measures into it. [Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 147, 105 S. Ct. 3085, 87 L. Ed. 2d 96 \(1985\)](#). In those instances in which Congress has provided an adequate relief for an injury to a beneficiary, equitable relief will typically be unnecessary. [Varity Corp. v. Howe, 516 U.S. 489, 515, 116 S. Ct. 1065, 134 L. Ed. 2d 130 \(1996\)](#). In *Varity*, the Supreme Court feared that in providing equitable relief for such claims when other

relief was provided by statute, attorneys would complicate ordinary benefit claims by disguising them in "fiduciary duty" clothing. *Id.* at 514.

It does not appear that the Plaintiff in this case is seeking to obtain any form of relief in Count I (claim for benefits) that is different from its quest in Count II (breach of a fiduciary duty). Since the requested relief [*13] is virtually identical in both Counts, and inasmuch as the Plaintiff has been provided with an adequate statutory basis upon which to pursue its claim under existing federal law, this claim for a breach of fiduciary duty must fail.

Since the Plaintiff's breach of a fiduciary duty claim is, in effect, an application for benefits, it is unnecessary to analyze the breach of fiduciary claim framework since, according to the Supreme Court, such a claim does not exist.

VI.

In Count III of the Complaint, the Plaintiff asserts a claim for unjust enrichment. According to the Plaintiff, the Defendants would be unjustly enriched if they are allowed to retain the monies that were expended for this infant's medical care and services. The language in [29 U.S.C. § 1132\(a\)\(3\)\(B\)](#) limits the relief that is available to an applicant, such as the Plaintiff, under [§ 502\(a\)\(3\) of ERISA](#) to "equitable relief." The term, "equitable relief," as used in [§ 502\(a\)\(3\)](#) refers to "those categories of relief that were typically available in equity" *Great-West Life v. Knudson*, 534 U.S. 204, 210, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002). Traditionally, a claim for monies that are [*14] due and owing under a contract is an action at law. *Id.* Suits that seek to compel the defendant to pay a sum of money to the plaintiff are suits for money damages since they seek no more than a loss of compensation which resulted from the breach of a legal duty. *Id.*

In this lawsuit, the Plaintiff denies that it is seeking money damages. Rather, it is the Plaintiff's contention that (1) Baby Jordan should be permitted to enroll in the Plan with a retroactive enrollment date of February 5, 1999, the date of his birth, and (2) the Defendants should be required to process all of the medical claims that were incurred by this minor child during his brief lifetime, citing *Mathews v. Chevron*, 362 F.3d 1172 (9th Cir. 2004). In *Mathews*, the court ordered Chevron to modify its records so it could retroactively reinstate six plaintiffs into its retirement plan. The court explained that this directive was not an award of monetary damages because it was an equitable judicial measure which was designed to return the plaintiffs to a position where they would have been if Chevron taken appropriate measures from the beginning. *Id.* at 1186. Contrary to the [*15] argument by the Defendants, the factual underpinnings in *Mathews* and the case at bar are inapposite, distinguishable and not persuasive.

Since the essence of the Plaintiff's claim is the Defendants' denial of benefits, this issue has already been presented as Count I of the Complaint. ERISA already provides the Plaintiff with a cause of action under [29 U.S.C. § 1132\(a\)\(1\)\(B\)](#). Hence, this claim for unjust enrichment is preempted by ERISA.

VII.

[29 U.S.C. § 1133\(1\) \(2005\)](#) requires each employee benefit plan to provide adequate notice in writing regarding the denial of claims to any plan participant or beneficiary. This notice must set forth the specific reasons for the denial and should be written in a manner that is readily understood by the participant or beneficiary. *Id.* This statute also requires that a full and fair review be given to any participant or beneficiary whose claims have been denied. [29 U.S.C. 1133\(2\) \(2005\)](#).

In Count IV of the Complaint, the Plaintiff contends that the Defendants failed to provide Baby Jordan with a full and fair review regarding the denial of his benefits. The term "participant" [*16] means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. [29 U.S.C. § 1002\(7\) \(2005\)](#). The word, "beneficiary," refers to "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." [29 U.S.C. § 1002\(8\) \(2005\)](#).

Here, a determination regarding the merits of the claim was not made because Baby Jordan was never covered under the Plan. According to its terms, Peggy Jordan was under an independent obligation to enroll her child into the program in order to receive medical benefits. However, the Plaintiff asserts that it never received such a letter from the Defendants which set forth the grounds for their denial of the claim. Although Ricks, a vice president and general counsel for Spunkmeyer, forwarded a letter of rejection to the Plaintiff, he never articulated the basis of the [*17] denial. Instead, he merely referred the Plaintiffs to an earlier letter, dated March 16, 2001, which ostensibly served as the basis for the denial. His letter should have articulated the specific reasons for the rejection rather than

to make reference to another piece of correspondence for clarification. Ricks' letter hardly satisfies the standard in [29 U.S.C. § 1133](#).

Although the Defendants were obligated under federal law to provide the Plaintiff with a sufficient basis for their rejection, they failed to do so. However, despite their non compliance with [§ 1133](#), the Defendants' violation is *de minimus*. The Plaintiffs knew, or should have known, the basis for the Defendants' denial of their claim for benefits because Baby Jordan was never officially enrolled under the Plan. Thus, the Defendants' failure to comply with the statute does not have any practical or legal effect upon this motion.

VIII.

Following a review of the record, this Court concludes that there are no genuine issues of a material fact in this cause. It is undisputed that Baby Jordan was never enrolled into his mother's health benefits plan. As a consequence, the Plaintiff is unable [*18] succeed on its claim for benefits. Additionally, the Defendants are not unjustly enriched by virtue of their decision to reject the Plaintiff's claim for benefits. Here, the Plaintiff's quest for relief is pre-empted by ERISA because it is, in effect, a claim for benefits as articulated in Count I of the Complaint. Furthermore, the Plaintiff's breach of fiduciary duty claim must fail as well because it is, in reality, an application for benefits, which has already been asserted in its Complaint. Accordingly, the Defendants' motion for the entry of a summary judgment must be, and will be, granted.

IT IS SO ORDERED.

DATED: March 6, 2006

Detroit, Michigan

s/ Julian Abele Cook, Jr.

United States District Judge